IN THE

COURT

FOR

THE TRIAL OF IMPEACHMENTS,

AND THE

CORRECTION OF ERRORS.

Philip Van Cortlandt, Pierre Van Cortlandt, Catharine Van Wyck, Gerard G. Beekman and Cornelia his wife, and Philip S. Van Rensselaer and Ann his wife—Appellants,

VS.

Abraham I. Underhill and Joshua Underhill—Respondents.

CASE ON THE PART OF THE APPELLANTS.

NEW-YORK:

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vs.
Abraham I. Underhill and Joshua Underhill—*Respondents*.

Case on the part of the Appellants.

On an appeal from a decree made by his honour the Chancellor, in an original suit, wherein the respondents are complainants, and the appellants defendants; and in a cross suit, wherein the appellants are complainants, and the respondents and others defendants.

On the 21st day of September, 1813, the respondents filed their bill of complaint in the court of chancery, against the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, in substance as follows, viz.

Respondents' original bill in the court of chancery.

By an indenture of lease, dated the 18th day of February, 1792, and made between the appellant Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, of the first part, and the respondents, and Robert Underhill, Thomas Burling, and William Burling, of the second part, the lessors demised to the lessees a mill-seat and parcel of land situated on Croton river, (and near the mouth thereof,) in Cortlandt town, in the county of West-Chester, containing seventy acres, for the term of 21 years, from the 1st of May, 1792, reserving the annual rent of forty pounds, to commence on the 1st of November, 1792. The lessors covenanted, that the lessees might erect or build any mills, and other buildings, on the premises, during the continuance of the term. That they would permit

the lessees, for building the said mills and other buildings on the premises, to cut good and sufficient timber within two miles of the premises, and would, on request, point out where the same should be cut; and, by the said lease, it was mutually agreed upon by the parties thereto, that, at the expiration of the said term, the mill or mills then standing on the premises, and whatever might appertain thereto, should be valued by two persons *indifferently chosen by the parties, and, in case of their disagreement*, by a third person, to be chosen by the two, and that the said appraisement or valuation should be binding on the said parties; that the lessors should pay to the lessees the amount of the said appraisement or valuation, deducting only from the same the value of the timber which the lessors should find as aforesaid, as it was when standing. That all other buildings then standing on the said premises should, in like manner, be appraised or valued, and the amount thereof (not exceeding two hundred pounds) paid to the lessees by the lessors; and that the lessees should have the liberty and privilege of cutting and making use of any trees on the premises (except locust and red cedar) for firewood, to be used by the lessees on the said premises; and, also, that the materials mentioned in a schedule to be annexed to the said lease should, or might, be used by the lessees, but should be left on the premises, at the expiration of the said term, for the lessors, being their property.

Owing to some accident, or mistake, the respondents did not execute the lease, yet they accepted the same with the other lessees, and were equally concerned therein, and were so considered by them, and the appellant Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased.

No schedule was annexed to the lease, nor was any schedule made of the materials to be used by the lessees, and left on the premises as the property of the les-

sors; those materials were of small value, and were all (except such as were consumed by use) left on the demised premises.

The respondents, and Robert Underhill, Thomas Burling, and William Burling, at, or shortly after, the commencement of the term, entered on and took possession of the premises, erected a mill thereon, built a dam across Croton river, a dwelling-house, out-houses, barns, and other buildings necessary for their accommodation and the prosecution of their business, and laid out large sums of money in building and erecting the same.

The respondents and their co-lessees paid the rent reserved up to the 30th of November, 1795.

The appellant, Philip Van Cortlandt, applied to the respondents and their co-lessees, about the last of November, 1795, for an underlease of a part of the demised premises adjoining Croton river, and the privilege of using part of the water collected for their mill, for the purpose of building a mill to manufacture flour, and they, by an agreement in writing, dated the 30th of November, 1795, demised to the appellant, Philip Van Cortlandt, until the expiration of the said lease to them, the privilege of building a merchant mill of two run of stones four and an half feet diameter, with two over-shot water wheels, and necessary machinery; the north-west corner of the said mill to stand on a certain marked rock in the wall by the river side, south of the saw-mill belonging to the respondents and their co-lessees, and from thence extending easterly and southerly, together with the privilege of making a road up the hill to the new post-road, and of erecting a building, for the only purpose of storing barrels, on the west side of the river adjoining, and on the north or east side of a certain black-smith shop, and of using water for two run of stones, to be taken from the sluices or trunk for conveying water; for which privileges, together with others granted to the appellant, Philip Van Cortlandt, he agreed to pay

them annually one hundred dollars for the residue of the term.

Immediately, or shortly after the execution of the said agreement, the appellant, Philip Van Cortlandt, entered upon the demised premises, and erected a mill, and enjoyed the privileges aforesaid until the expiration of the term therein mentioned. The appellant, Philip Van Cortlandt, agreed with the respondents and their co-lessees, that the yearly rent to become due from him under the last-mentioned agreement, should be set off against, and extinguish, the annual rent of forty pounds, reserved by the said lease before mentioned.

The respondents and their co-lessees settled the rent, under such agreement, with the appellant, Philip Van Cortlandt, up to the 20th of November, 1799, and have in their hands his receipt for the same; since which time they have neither paid rent to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, nor have they received any from the appellant, Philip Van Cortlandt; but it was always considered that one was a set-off against the other, which the respondents supposed was understood and concurred in by the said Pierre Van Cortlandt, deceased.

On the 5th February, 1799, Thomas Burling and William Burling, by a release dated on that day, in consideration of one dollar, granted, bargained, sold, and forever quit claimed unto Robert Underhill and the respondents, all their rights and interest in the said premises, demised to them and their co-lessees as aforesaid, and the mills, stores, dwellings, and improvements thereon.

Robert Underhill, by a release dated the 1st day of May, 1804, in consideration of *six thousand dollars*, bargained, sold, released, and transferred unto the respondent, Abraham I. Underhill, all his right and interest in the said premises, demised to the said Robert Underhill and his colessees as aforesaid, together with the mills, raceway,

dams, stores, dwellings, and all other improvements thereunto belonging or appertaining.

The respondent, Abraham I. Underhill, by an indenture of bargain and sale, dated 2d May, 1804, in consideration of three thousand dollars, granted, bargained, sold, released, assigned, transferred, and forever quit claimed unto the respondent, Joshua Underhill, the one equal sixth part of all the said premises demised to the respondents and their co-lessees as aforesaid, together with one equal sixth part of the mills, raceway, dams, stores, dwellings, and other improvements on the said premises, together with the one equal sixth part of the appurtenances, privileges, &c. thereunto belonging, the privileges of a mill theretofore granted to the appellants, Philip Van Cortlandt, and the improvements made by him and Jesse Field thereon, excepted.

The last mentioned release was intended, in connection with the other conveyances and assignments from the other lessees, to vest in the respondents equally the whole estate and interest in the said demised premises, and therefore the respondents allege, that by virtue of the said lease, and the other releases and conveyances above mentioned, they became jointly and equally interested in, and entitled to, the said demised premises, and to all the benefit, profit, and advantage, to arise therefrom or thereout.

To prevent any questions that might arise between the respondents, respecting the same, they made and executed a memorandum in writing, dated the 19th April, 1806, whereby it was agreed, that the respondents were equally concerned in the said mills and improvements.

Before the expiration of the term granted by the said lease, the respondents proposed to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, that as there was an omission in the lease, in not pointing out the manner of ascertaining the value of the timber used by the lessees, in the mill and buildings erect-

ed by them according to the terms of the lease, they should enter into a written agreement, that the same should be appraised and valued, by the persons chosen to appraise and value the mills and other buildings, improvements and appurtenances, in pursuance of the agreement for that purpose in the said lease, or in such other equitable way as should be agreed upon; with which proposition the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, refused to comply.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, or either of them, did not furnish the respondents or their co-lessees, or either of them, a schedule containing the articles left by them on the premises, at the time of the execution of the lease, or at any other time; but on or about the 28th of January, 1813, requested the respondents to furnish them with a schedule of the articles left by them on the premises when the lease was given; in compliance with which request, the respondent, Abraham I. Underhill, did, on the 30th of January, 1813, make a schedule of such materials as were left on the premises; (which schedule is particularly set forth in the bill;) the schedule was directed to Pierre Van Cortlandt, deceased, and the appellant, Philip Van Cortlandt, and delivered to Theodorus C. Van Wyck, their attorney and authorized agent, on the day it bears date. All the articles left on the premises by the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, except such as were consumed in the usage, were left there at the time possession was delivered to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, except such articles as were taken off the premises, by them, or their order, or agents. The respondents and their co-lessees never used the said articles for any purpose off the demised premises, but the same were used with the same care as if they had been their own private property.

mills in the possession of the appellant, Philip Van Cortlandt and John F. Hallman, built on the premises, underlet as aforesaid, and included the valuation in the same report; but the respondents claim no interest therein, and the same was not made at their request.

At the time the appraisers were on the premises, and engaged in making the valuation, the respondents proposed to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, or one of them, that the appraisers should also appraise the value of the timber used by the said lessees in erecting the mills and other buildings on the said premises; that the value thereof be deducted from the sum at which the mills should be valued by the said appraisers, or otherwise paid and satisfied by the respondents; but the said proposal was disagreed to by the said Pierre Van Cortlandt, deceased, and the appellant, Philip Van Cortlandt, or their agents, who attended.

On the said valuation and appraisement of the said mills, and whatever appertained thereto, and the buildings standing on the said premises, being made and delivered as aforesaid, the respondents offered to the said Pierre Van Cortlandt, deceased, and the appellant, Philip Van Cortlandt, to deliver up the said premises, in case they would pay the amount of the appraisement; and offered to allow them two hundred dollars for the timber used in building the said mills, and other buildings, which sum, they believe, was the full value thereof, or more; but which offer was refused. And notwithstanding the said offer has been repeatedly made, at different times since, the same has always been refused; and the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, have hitherto refused to pay the amount of the appraisement, or any part thereof, to the respondents.

Although the respondents were advised by their counsel, that they had a good right to hold possession of the said

This is to certify all whom it may or doth concern, that we, the subscribers, chosen appraisers according to the terms and conditions of a certain lease, given by Pierre Van Cortlandt, and Philip Van Cortlandt, of the town of Cortlandt, to Robert Underhill, Abraham Underhill, Joshua Underhill, Thomas Burling, and William Burling, bearing date the 18th of February, 1792, have examined the mills, and whatever appertains thereto, made by virtue of the said lease by the lessees, and now owned by Abraham I. Underhill and Joshua Underhill, two of the lessees, aforesaid, and having heard the allegations of the parties, and duly considered the whole subject, agreeable to the conditions of the said lease, do report, that according to our best judgment and belief, the said mills, and whatever appertains thereto, belonging to the said Abraham I. Underhill and Joshua Underhill, are worth eighteen thousand dollars lawful money of the State of New-York; and that the value of all other buildings, not appertaining to mills, erected by the lessees, and standing on the premises, and owned by the defendants, exclusive of the timber furnished by the lessees in making the same; and also, exclusive of the Franklin stove in the house, and loose boards on the premises, and such other articles as are generally considered moveables, are worth five hundred dollars lawful money, as aforesaid; and in consideration of all the above, we have hereunto put our hands and seals, this 8th day of July, 1813.

Which report was signed and sealed, by Samuel Mott, Nathan Anderson, and David Lydig; and one copy thereof, signed and sealed as aforesaid, was, on or about the date thereof, delivered to the said Pierre Van Cortlandt, deceased, or his agent; another copy, signed and sealed as aforesaid, was, on or about the date thereof, delivered to the appellant, Philip Van Cortlandt; and another copy to the respondents.

The said appraisers, at the request of the appellant, Philip Van Cortlandt, or some other person, appraised the

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, do not admit that the said paper contains a list of the articles left by them upon the premises, and intended to have been included in the schedule agreed to have been annexed to the lease.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit, that the respondents and their co-lessees, immediately, or shortly after the commencement of the term, took possession of the premises, and erected thereon a mill, dwelling-houses, out-houses, a barn, and other buildings necessary for their accommodation, and the prosecution of their business, and a dam across Croton river, as alleged in the bill; and they admit that the respondents necessarily expended large sums of money in building and erecting the dam, mills, and other buildings; but the sums so laid out by the respondents and their co-lessees amounted to a much less sum than the respondents have lately pretended.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit that the respondents and their co-lessees paid all the rents reserved by the lease, until the 30th day of November, 1799; and that the appellant, Philip Van Cortlandt, on or about the time expressed in the bill, applied to the respondents and their co-lessees to take an underlease of them, of such part of the premises, for the residue of the term, and for such purposes, and with such privileges, as is alleged in the bill; and they further admit, that the respondents and their co-lessees, on the application of the appellant, Philip Van Cortlandt, by such agreement as is set forth in the bill, did make such demise and agreement with the appellant, Philip Van Cortlandt, and for such terms as are alleged in the bill; and that the appellant, Philip Van Cortlandt, by the said agreement, agreed to pay them annually 100 dollars for the said privileges during the residue of the said term.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, further admit, that the appellant, Philip Van Cortlandt, entered upon the premises demised to him, and built a mill, (with Jesse Field,) and used and enjoyed the privileges mentioned in the underlease, until the expiration of the lease made to the respondents and their co-lessees.

The mill built by the appellant, Philip Van Cortlandt, and Jesse Field, was built partly upon the premises underlet as aforesaid, and partly upon other lands belonging to the said Pierre Van Cortlandt, deceased.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, further admit, that the appellant, Philip Van Cortlandt, agreed with the respondents and their co-lessees, at the time of executing the underlease, that the rent reserved thereby should be set off against the rent reserved by the first mentioned lease, the rents being equal.

The appellant, Philip Van Cortlandt, says, that the rent reserved by the underlease to the respondents and their co-lessees, was not the only consideration for the demise contained in the underlease; but, in further consideration for such demise, the appellant, Philip Van Cortlandt, by the said underlease, demised to the respondents and their co-lessees, during the residue of the term granted by the original lease, about twenty-five acres of good pasture and meadow land adjoining the mill, worth, at least, 30 dollars per annum. The respondents and their co-lessees immediately, or shortly after the date of the underlease, took possession of the said land, and held the same until the expiration of the term.

The appellant, Philip Van Cortlandt, not only made the last mentioned demise, and consented to pay the rent reserved by the underlease, but he and the said Jesse Field, (who were connected together in the business of manufacturing flour,) having occasion for an additional quan-

as the court should direct; and that the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, may pay to the respondents their costs in that behalf to be taxed; and that the respondents might have such other relief as should seem proper and meet.

On the 10th day of January, 1814, the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, filed their answer to this bill as in substance follows, to wit:

Answer of the appellant Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, to the respondents' original bill in the court of chancery.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit the execution of the lease mentioned in the bill; and that the contents of the lease are substantially such as are set forth in the bill.

They further admit, that the respondents did not execute the lease, and that they accepted the same with the other lessees, and were equally concerned therein, and were so considered by the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, and (as they believe) by the said Robert Underhill, Thomas Burling, and William Burling.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, further admit, that, to the best of their knowledge, recollection, and belief, no schedule was made out, and annexed to the lease; and that no schedule or memorandum was made, to their knowledge or belief, of the articles or materials mentioned in the said lease, to be used by the lessees, and to be left on the premises at the expiration of the term for the lessors, being their property.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, have neither of them, to their knowledge, recollection, or belief, made any memorandum of the said articles, nor do they know whether any was made by any other person; they believe and admit, that the said articles and materials were of small value, and suppose and believe, that the articles intended to be inserted in such schedule, were certain articles of small value, then in use, in and about certain mills then stand-

ing upon the said premises; and which mills were demised, with the residue of the said premises, to the respondents and their co-lessees, by the said lease.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, do not know, and cannot answer, whether all the articles or materials referred to in the lease, which were not consumed by use, were left on the premises at the expiration of the term, for their use, as alleged in the bill; they admit, that neither of them furnished to the respondents and their co-lessees, or either of them, a schedule containing a list of the articles left on the demised premises at the time the said lease was executed, or at any other time.

They further admit, that, at or about the time mentioned in the bill, they requested the respondents to furnish them with a schedule, or list, of the articles left on the premises at the time the lease was executed; they deny that, to their knowledge, information, or belief, the respondent, Abraham I. Underhill, at or about the time expressed in the bill, or at any other time, delivered to Theodorus C. Van Wyck (whom they admit to have been their agent or attorney) a schedule, or other paper, in the words, or to the precise effect, set forth in the bill.

On or about the 30th day of January, 1813, the respondent, Abraham I. Underhill, delivered to the said Theodorus C. Van Wyck, a paper writing, subscribed by the respondent, Abraham I. Underhill, and directed to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased.

[This paper is set forth in the answer *in hæc verba*, and purports to be in answer to a request made by the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, on the 28th of January, then instant, to be furnished with a schedule of the property on the demised premises when the lessees took possession.]

tity of water for the use of the mill, erected by them, by virtue of the under lease, they paid the respondents, and Robert Underhill, 1000 dollars on the 2d day of November, 1801, for the privilege of using, (under certain restrictions) during the residue of the said term, water sufficient to carry two pair of mill-stones, with the machinery in the said mill.

By the under lease, it is covenanted and agreed, that the said dam and raceway should be maintained and kept in repair, and certain improvements made upon the premises, at the joint expense of the appellants, Philip Van Cortlandt, and the respondents, and their co-lessees, to be borne in the proportions set forth in the under lease, and from the 30th day of November, 1795, (the date of the under lease,) to the said 2d day of November, 1801, the said dam and raceway were maintained and repaired at the joint expense of the respondents, and their co-lessees, and the appellant, Philip Van Cortlandt, or persons holding under him, according to the rate contained in the under lease; and from the 2d day of November, 1801, until the end of the term, the said dam and raceway were maintaintained, and repaired, at the joint and equal expense of the respondents, and Robert Underhill, or some of them, and the appellant, Philip Van Cortlandt, and Jesse Field, or the persons who have since held and occupied, under the appellant, Philip Van Cortlandt, the mill built on the said premises, underlet as aforesaid.

The respondents claim, and for some years have claimed, to be jointly and equally entitled to, and interested in, the said premises, (to the exclusion of their co-lessees,) and to be entitled to all the benefit and advantage arising, or to arise therefrom, as well as to the rents and other profits arising and reserved by the under lease; and they claim to be so interested and entitled, (as the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, are informed, and believe to be true) by

virtue of certain quit-claims, deeds, or other writings, alleged to have been made and executed by and between the respondents and their co-lessees; and from all the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, have heard they believe it highly probable the respondents are in fact so interested and entitled; but whether they be jointly and equally interested, to the exclusion of their co-lessees, they do not know, except from hearsay, and the declaration of the respondents, and are entirely strangers to the agreements, deeds, &c. alleged in the bill to have been entered into, and executed by and between the respondents, and by and between them and their co-lessees.

The said Pierre Van Cortlandt, deceased, by the said answer, denies that, to his knowledge, recollection, or belief, the respondents, previous to the expiration of the said term, proposed that the timber, used by the respondents and their co-lessees, in the mill and buildings, erected by them on the premises, under the lease, should be appraised and valued by the persons, to be chosen to appraise the mills, buildings, and appurtenances, pursuant to the lease; or to ascertain the value of the said timber in any other equitable way, to be agreed upon between them: or that he, or to his knowledge, the appellant, Philip Van Cortlandt, refused to comply with, or agree to, such proposition.

The appellant, Philip Van Cortlandt, says, that some short time before the expiration of the said lease, the respondent, Abraham I. Underhill, called upon him, and producing a paper writing, which he represented as being some agreement touching the premises, he requested him to execute it; that he declined to execute it, and, to the best of his knowledge, he did not read it; and that he doth not know the contents thereof; and if the said paper writing contained such proposition or agreement, then he refused to comply therewith; and if the said paper writing did not contain such proposition, then that he hath not re-

fused to comply with such proposition or agreement, and that the respondent, Abraham I. Uunderhill, hath not, to his knowledge or recollection, at any other time, or in any other manner, or on any other occasion, made him any such proposal, touching the valuation of the timber, as is set forth in the bill; nor hath he refused to comply with, or agree to, any such proposal or agreement, or any other proposal or agreement, touching the valuation of the timber, otherwise than last above mentioned.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit that the term expressed in the lease, to the respondents and their co-lessees, expired on the 1st day of May, 1813.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, and the respondents, did not mutually choose Nathan Anderson and Samuel Mott, according to the terms of the lease, to appraise and value the mills, and whatever appertained thereto, and the other buildings standing upon the premises, as alleged in the bill: that is to say, neither Nathan Anderson nor Samuel Mott was chosen by them jointly.

Nathan Anderson, and (as they believe) Samuel Mott, were appointed in the following manner, that is to say:

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, mistaking their rights touching the valuation, covenanted by the lease, to be made of the mills and appurtenances, and other buildings; and supposing that the legal and true intent and meaning of the covenant for that purpose contained in the lease, was, that the two persons, to be chosen and appointed to make such valuation and appraisement, should be chosen by each of the parties separately, and not by the parties jointly; that is to say, that they should choose one appraiser, and the respondents, or they and their co-lessees, should choose another, instead of mutually and jointly choosing the two appraisers, as they are now advised, and submit is

the true construction of the covenant. They did, on the 28th day of April, 1813, appoint Anderson to be such appraiser, on their part, and delivered to him a paper writing, signed by them, of the tenor following, viz.

"Whereas we, the subscribers, granted a certain lease to Robert Underhill, Abraham Underhill, Joshua Underhill, Thomas Burling, and William Burling, of all that certain mill-place, and pieces of land on each side of Croton river, near the mouth, dated the eighteenth day of February, in the year one thousand seven hundred and ninety-two, which said lease expires on the first day of May, in the year one thousand eight hundred and thirteen. We, therefore, according to the requisition of the said lease, have nominated, constituted, and appointed, and hereby do nominate, constitute, and appoint, Nathan Anderson, of the town of Cortlandt, to appraise or value the mill, or mills, and whatever may appertain thereto, and all other buildings that shall be standing on the said premises, at the expiration of the said lease. Town of Cortlandt, April 28th, 1813. Pierre Van Cortlandt. Philip Van Cortlandt."

On the 28th day of April, 1813, the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, caused to be delivered to the respondent, Abraham I. Underhill, a written notice, signed by them, of the tenor following, viz.

"Town of Cortlandt, April 28th, 1813.

GENTLEMEN,

Please to take notice, that according to the requisition of a certain lease, dated the 18th day of February, 1792, of all that certain mill-place, and pieces of land on each side of Croton river, near the mouth, granted by Pierre Van Cortlandt, and Philip Van Cortlandt, to Robert Underhill, Abraham Underhill, Joshua Underhill, Thomas Burling, and William Burling, we, the grantors of the said lease, have appointed Nathan Anderson, of the town

of Cortlandt, to appraise or value the mill, or mills, and whatever may appertain thereto, and all other buildings that shall be standing on the said premises, at the expiration of the said lease.—Pierre Van Cortlandt, Philip Van Cortlandt.—To Robert Underhill, Abraham Underhill, Joshua Underhill, Thomas Burling, and William Burling."

On the 1st day of May, 1813, the appellant, Philip Van Cortlandt, received a notice from the respondents, or one of them, or from some person acting on their behalf, of the tenor following, viz.

"Cortlandt Town, 5th mo. 1st, 1813.

Respected Friends,

According to the requisition of a certain lease, dated the 18th day of February, 1792, of all that certain mill-place, and pieces of land on each side of Croton river, near the mouth, granted by Pierre Van Cortlandt, and Philip Van Cortlandt, to Robert Underhill, Abraham Underhill, Joshua Underhill, Thomas Burling, and William Burling, we, the present holders and owners of the said leased premises, have appointed Samuel Mott, flour merchant, of the city of New-York, to appraise or value the mills, and whatever may appertain thereto, and all other buildings now standing on the said premises, agreeable to the said lease.—Abraham I. Underhill, Joshua Underhill. —To Pierre Van Cortlandt, Philip Van Cortlandt."

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, did not object to Samuel Mott, as one of the appraisers, because they supposed they were not entitled to do so: the said Pierre Van Cortlandt says, that had he known he could legally have objected to Samuel Mott, as one of the appraisers, he would have done so, and would not have consented to his being one of the appraisers: the appellant, Philip Van Cortlandt, says, that

had he known he could legally have objected to Samue Mott, as one of the appraisers, he would have done so; and believes he would have adhered to such objection.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit, that Nathan Anderson and Samuel Mott met upon the premises for the purpose, as they understood, of making the said appraisement, and that they examined (though in a slight, cursory, and imperfect manner) the grist-mill, standing on the said premises, and some, but not all, of the appurtenances thereto; and some, but not all, of the other buildings; and that they conferred together, but not upon the subject of the said appraisement, or touching the value of the said mills, or appurtenances, or other buildings.

And they deny that, to their knowledge or belief, Nathan Anderson and Samuel Mott disagreed, or were unable to agree, as to the value of the said mills and appurtenances, and of the other buildings, as is alleged in the bill: and they further deny that Nathan Anderson and Samuel Mott, being unable to agree, proceeded agreeably to the terms, or intent and meaning of the lease, and chose David Lydig for the third appraiser, as alleged in the bill.

Since the making of the appraisement, set forth in the bill, the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, have been informed, (and believe and aver the same to be true,) that Nathan Anderson, and samuel Mott did not confer together, touching the value of the said mills and appurtenances and other buildings, or any part thereof: that they neither agreed nor disagreed, as to the value of the same, or of any part thereof; nor did they, or either of them, express to the other any opinion, touching the value thereof, or of any part thereof; nor did they choose or appoint David Lydig to be such third appraiser, in consequence of any difference of opinion between them, touching the said matters, or any of them: but that, on the contrary, Nathan

Anderson, at the request and suggestion of Samuel Mott, privately made to him, informed the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, that they (Nathan Anderson and Samuel Mott) had disagreed, and could not agree, touching the value of the said property; and Nathan Anderson and Samuel Mott, in consequence of their pretended disagreement, and in violation of the trust reposed in them, and without authority, under the said covenant, did, by a writing, under their hands, appoint, or pretend to appoint, David Lydig, to be such third appraiser; but, for greater certainty, as to the nature and particulars of such appointment, they refer to the same, when produced by the respondents.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit that David Lydig agreed to serve as such third appraiser, and that no objections were made to him by them, or the respondents; and that they did not object to the appointment of David Lydig, because they supposed that Nathan Anderson and Samuel Mott had acted in good faith in making the appointment, and that they had actually disagreed, or could not agree touching the value of the property to have been valued by them, or of some part thereof.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit that Nathan Anderson, and Samuel Mott agreed with their consent and approbation to adjourn the meeting until such time, and for such purposes, as in the bill is alleged; and they further admit, that about the time mentioned in the bill, Nathan Anderson, Samuel Mott, and David Lydig, with the parties or their agents, met upon the premises, and viewed (though in a slight, cursory, and imperfect manner,) the grist mill standing upon the premises, and some, but not all, of the appurtenances thereof; and some, but not all, of the other buildings for the purpose of appraising the same as alleged in the bill:

Nathan Anderson, Samuel Mott, and David Lydig, did not duly view and examine the said grist mill; nor take an account of the timber thereof; nor did they duly examine the timber with respect to its soundness; nor did they duly examine the machinery of the mill with respect to its soundness and fitness; nor did they duly examine the six run of mill-stones in the said mill; nor did they at all examine three of those runs as they ought to have done according to the trust reposed in them.

Several years before the expiration of the term mentioned in the lease, the respondents and their co-lessees built upon the demised premises a saw-mill, which at the time of making the appraisement, was, and still is, standing, (though in a very bad condition,) and is one of the mills which ought to have been valued by the appraisers in pursuance of the covenant contained in the lease; and Nathan Anderson, Samuel Mott, and David Lydig, did not at all examine the said saw-mill, or confer touching the value thereof.

Nathan Anderson, Samuel Mott, and David Lydig, after having viewed the premises as above mentioned, but not otherwise, in the presence of the parties or agents, and examined the lease, and partly, but not fully heard the parties relative to the matters submitted to them, and without hearing certain testimony which Theodorus C. Van Wyck, the agent of the said Pierre Van Cortlandt, deceased, was desirous to have produced, and offered to produce to them relative to the matters submitted to them, as herein after set forth; and also, after having had a private and ex parte meeting with the respondent, Abraham I. Underhill, and having received from him at such interview false and ex parte communications and statements in relation to the matter submitted to them, as herein after set forth, made a certain appraisement of the premises, and included therein certain property which ought not to have been appraised or included in that appraisement, as herein

after set forth. [The whole appraisement is set forth in hæc verba in the answer; and, in addition to what is set forth in the bill, it appears that the mills in the possession of the appellant, Philip Van Corlandt, and John F. Hallman are appraised at thirteen thousand dollars.]

The appraisers, at the request of the appellant, Philip Van Cortlandt, appraised one grist mill with its appurtenances, in the possession of himself and John F. Hallman, built on the premises underlet as aforesaid, and included such valuation in the appraisement above set forth, in which the respondents have no interest.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, deny, that to their knowledge, remembrance, or belief, the respondent, at the time when the appraisers were on the said premises, and engaged in making the said valuation, made such proposal, touching the valuation of the timber mentioned in the bill, as is therein set forth, and that such proposal was disagreed to.

They admit, that after the said appraisement had been made and delivered, the respondents offered to deliver up the premises in case the amount of the appraisement was paid; and that the respondents also offered to allow two hundred dollars for the timber used in building the mills and other buildings; and that such offer was refused; they deny that two hundred dollars was the value of the said timber. They also admit, that the respondents have at different times repeated the last-mentioned offer, and that they have always declined or refused to accept the same, and that they have also, hitherto, refused to pay the respondents the amount of the appraisement, or any part thereof; but they are, and have been, ever since the making of the appraisement, ready and willing to pay the respondents the real value of the mills and appurtenances according to the covenant contained in the lease; and also, to pay in the manner prescribed in the covenant,

for all the other buildings and property, which, pursuant to the covenant, ought to be valued and paid for by them.

The respondents retained the possession of the mills and premises, and refused to deliver up the possession until the 13th (and not 15th) day of August, 1813, when they delivered up the key of the grist mill, in the manner, and with the intent set forth in the bill.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, admit, that the respondents previous to, at the time, and since the possession of the said mills, &c. were delivered up, requested them to pay the said sum of eighteen thousand dollars; and that the respondents offered and proposed, that the sum of two hundred dollars should be deducted and retained out of the amount of the said valuation, for the value of the timber mentioned in the bill; and that those offers have been uniformly and wholly rejected by them, as alleged in the bill.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, deny, that to their knowledge, remembrance, or belief, they have refused to concur with the respondents in adopting any fair or proper mode of ascertaining the value of the timber by the intervention and judgment of third persons, or otherwise.

Nathan Anderson and Samuel Mott did not choose David Lydig as an *umpire*, in relation to the matters submitted to them; but, they chose and appointed him to aid and assist them, in making an appraisement of the matters submitted to them; and the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, submit that Nathan Anderson and Samuel Mott were not authorized by the lease, to choose or appoint David Lydig for the purpose of so aiding or assisting them.

Before the making of the appraisement, Theodorus C. Van Wyck, as the agent of the said Pierre Van Cortlandt, deceased, informed Nathan Anderson, Samuel Mott, and David Lydig, that he had material testimony to lay before

them respecting the matters submitted to them; and there upon, David Lydig declared he could not wait to receive the said testimony; and in consequence of that declaration, it was not produced.

While the appraisers were conferring upon the appraisement, David Lydig proposed to value the mills and appurtenances, (including certain licenses herein after mentioned,) at twenty thousand dollars; and thereupon Nathan Anderson declared, that in his opinion, the mills and appurtenances were not worth, by several thousand dollars, the sum at which David Lydig proposed to appraise them. David Lydig thereupon declared, that the respondents were enterprising men; that they had taken the mill seat while in a state of nature; that they had rendered the property valuable by their exertion; that the lease ought to be renewed, or a new lease granted of the premises to the respondents, and that under those circumstances he was of opinion that they ought to value the mills and appurtenances at as large a sum as they had cost the respondents.

Samuel Mott, concurring in the sentiments expressed by David Lydig, he, (Samuel Mott,) with the consent of the other appraisers, (but without the knowledge of the appellant, Philip Van Cortlandt, or the said Pierre Van Cortlandt, deceased,) called the respondent, Abraham I. Underhill, into the room where the appraisers were then conferring upon the subject of the appraisement, and then and there had and held a private and ex parte communication with him upon the subject of the said appraisement; the appraisers then and there inquired of the respondent, Abraham I. Underhill, the cost of making the dam and raceway, and also the cost of building the mills, or the cost of the mills and appurtenances; and thereupon the respondent, Abraham I. Underhill, falsely declared to the appraisers, that the making of the dam and raceway had cost ten thousand dollars; and that the building the mills, or the mills and their appurtenances, had cost the further sum

of ten thousand dollars; and the respondent, Abraham I. Underhill, being requested by Nathan Anderson to produce to the appraisers the accounts of the cost of the dam, raceway, mills, and appurtenances, replied that he possessed no accounts thereof, and thereupon, withdrew from the appraisers.

The appraisers, coutinuing to confer upon the subject of the appraisement, Samuel Mott, and David Lydig, concluded to appraise the mills and appurtenances, including the said licenses, (but without previously ascertaining the appurtenances, or their value) at 20,000 dollars; but finally consented, or proposed, to appraise the said property at 18,000 dollars, provided Nathan Anderson would sign the appraisement.

The making of the dam and raceway did not cost a sum exceeding 2000 dollars; and the respondents, or one of them or Robert Underhill, has confessed, that the making of the dam and raceway did not cost more than 2000 dollars.

The just and true value of the dam, raceway, mills, and appurtenances (excluding from the appurtenances the said licenses) did not exceed, at the time of making the appraisement, and does not now exceed, the sum of 6,500 dollars.

The appraisers, in making up the said appraisement, did not appraise separately, the several items of property submitted to their appraisement, as they ought to have done, but appraised and valued the whole at once, or in gross, including the said licenses.

The respondents, and their co-lessees, originally constructed the said raceway, for a grist mill of a differrnt construction from the present grist mill, and the original cost of such raceway is no just criterion of its present value, it being dug with a deeper descent than is necessary, or proper, for any mill fit to be erected on the said mill-seat.

The appraisers, at the request of the respondents, and contrary to the will of the said Pierre Van Cortlandt, deceased, included in their appraisement, certain licenses, (commonly called patent rights) to use certain elevators, and other machinery, in the manufacture of flour, which licenses, they alleged, belonged to the mill; but which licenses (for which the respondents have been allowed a very large sum of money, by the appraisers in the said appraisement,) did not appertain to the said mill; and that the respondents caused to be included in the said appraisement, certain licenses, to use such machinery, with seven run of mill-stones; whereas, in truth, there were only six run belonging to said mill; thus endeavouring to compel payment for licenses to use more machinery in the said mill than they used, and more than could conveniently be used in the said mill.

The respondents, and their co-lessees, or some of them, during the continuance of the said term, made great alterations and repairs in the grist mill, and cut and took timber for these purposes, and for other purposes, which stood upon lands belonging to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, or one of them; the value of which timber they submit ought to be paid to them by the respondents, or allowed to be set off, upon taking the account prayed for in the bill, in case such account should be decreed.

The respondents, and their co-lessees, during the said term, committed, or suffered great waste upon the premises; and particularly they suffered two grist-mills, one of which was in good repair, at the commencement of the term, and of very considerable value, and also a valuable raceway, belonging thereto, to become, and be entirely ruined and destroyed.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, submit, that they ought to be allowed the value of such waste, or destruction; and

that the amount thereof ought to be allowed to them, upon taking such account, if the same should be decreed.

The respondents have not assigned, or delivered, or offered to assign or deliver, the said licenses, or any of them, or to secure, in any manner, the right to use the machinery to be used under the said licenses. The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, do dot choose to accept a transfer of the said licenses, or any of them, unless, in the opinion of the court, the said licenses appertain to the mill, which, they submit, is not the fact.

The said licenses were, in the opinion of the appraisers, of considerable value; and although they did not determine upon any particular sum, as the value thereof, yet they allowed the respondents some large sum of money, more than they would have done if those licenses had not been deemed to appertain to the mill.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, submit, that the appraisement being, by reason of the matters herein before set forth, erroneous, excessive, unjust, and void; they ought not to be decreed to pay the said sums of 18,000 dollars, and 500 dollars, as prayed for in the bill.

The appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, are ready and willing, and offer to account with, and pay to, the respondents, (upon their producing and proving the deeds or releases from their co-lessees set forth in the bill,) the fair, just, and full value, at the expiration of the term of the mills and appurtenances, and of all the other buildings, according to the true intent and meaning of the lease; and they are ready and willing, and offer to join with the respondents in any measures for ascertaining the just and true value thereof, which the court shall deem reasonable, fitting, and proper.

To this answer the respondents filed a general replication.

The suit having afterwards become abated by the death of the said Pierre Van Cortlandt, the respondents, on the 26th day of November, 1814, filed a bill of revivor and supplement against the appellant, Philip Van Cortlandt, in his own right, and against him and the other appellants, as the real and personal representatives of the said Pierre Van Cortlandt, deceased; to which bill answers were put in by the appellants submitting to the revivor.

Bill of revivor, and answers thereto.

On the 23d day of June, 1815, the appellants filed a cross bill in the court of chancery, against the respondents and Nathan Anderson, Samuel Mott, and David Lydig, which bill, in addition to the matters set forth in the answer of the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, sets forth and contains in substance as follows, viz.

Cross bill of the appellants in the court of chancery.

At the commencement of the term granted by the lease herein before mentioned, there were erected, and being on the demised premises, two grist mills, a dam across Croton river, and a raceway for the use of the mills.

Shortly after the commencement of the term, the lessees named in the said lease entered upon the premises, and built a grist mill on the easterly side of Croton river, a dam across the river, (a small distance above the place where the dam that was standing at the time they took possession had been erected,) and dug, and constructed, a raceway to carry the waters collected by the dam to the mill. The lessees also erected, during the continuance of the term, a saw-mill, propelled by a part of the waters conducted by the raceway, two dwelling-houses, a barn, a waggon-house, a house for storing barrels, and some other small out-houses.

The timber and wood used by the lessees in building the said mills and other buildings, was cut and taken off the demised premises, or from off other lands belonging to the lessors, or one of them. The timber, wood, and other materials used in building the dam, was taken from off the

demised premises, or other lands belonging to the lessors, or one of them. The raceway extends forty rods, and, for the distance of thirty-two rods, is composed of stone and gravel, dug and taken from the demised premises; and the timber and wood used in building the residue of the raceway was, in like manner, cut and taken from off the premises, or other lands belonging to the lessors, or one of them.

At or about the time the lessees built their dam, they tore down and demolished the dam which was standing on the premises at the commencement of the term.

At or about the time the lessees built the saw-mill, they tore down and demolished one of the grist-mills which was standing on the premises at the commencement of the term; and the timber and materials thereof were used in building, or altering, the saw-mill, or in building some of the other buildings, or were consumed for firewood or some other purpose.

The lessees opened a valuable quarry of stone on the demised premises, on the westerly side of Croton river, nearly opposite the mills, which was not opened at the commencement of the term, and from which the stones composing the foundations of the mills, dwelling-houses, and other buildings, or the far greater part thereof, were taken.

Some short time after the lessees had built the mills, dam, and raceway, and in or about the year 1794, or 1795, they made an entire, or a very considerable alteration in the machinery of the grist-mill, which machinery so altered, or machinery upon the same construction, remained in the grist-mill during the residue of the term.

Had the raceway been originally constructed for the use of a mill containing machinery similar to that used in the grist-mill after its alteration, it might have been constructed at much less expense than it was.

The expense of building the mills, dam, and raceway, including the alterations in the machinery of the mill, did not exceed 14,000 dollars, or it amounted to a sum far less than 18,000 dollars. The expense of making the machinery, which became useless in consequence of the alterations, amounted to 1000 dollars.

The appellants submit, that the appointment of Samuel Mott, and also the appointment of David Lydig, was, and is, irregular and void.

The respondents, or one of them, in whose possession the premises were at the time they were viewed and examined, and had been for some time previous, with intent to injure and defraud the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, and to induce the appraisers to value the mills, and such matters as they insisted appertained thereto, at a sum greater than their real value, did, before the appraisers viewed and examined the mills, use divers unjust and improper means to conceal from the appraisers the state of repair in which the mills then were.

And, particularly, the respondents, (who had some time before the meeting of the appraisers, ceased to use the mills, or do any business therein,) or some person by their procurement or direction, covered with boards, or plank, and nailed up, the cog-pit, in which is contained some of the principal machinery of the grist-mill, by means whereof the appraisers were prevented from viewing the machinery in a proper manner, which was then in a very decayed state, and in bad repair, but such machinery was included in the appraisement.

And the respondents, or some person by their procurement or direction, covered over a part of the raceway with loose boards, or planks, which prevented the appraisers from properly viewing the timber and plank of that part of the raceway, some of which were then very decayed and rotten.

The roof covering that part of the grist mill, called the addition, at the time of the meeting of the appraisers, was very leaky and in bad repair, and the floor of the garret was in consequence of the leaks, very much spotted and stained; and in consequence of the leaks, the garret had not been used for the purpose of storing flour or meal for a very considerable time previous to the meeting of the appraisers; but the respondents or some person by their procurement or direction, some short time previous to the meeting of the appraisers, covered the floor with bran, shorts, meal or flour; to conceal the stains or spots on the floor from the appraisers, and to induce them to believe that the roof was not leaky, or in bad repair.

The appraisers did not, previous to making their appraisement, determine what matters and things were to be considered as appurtenances to the mills; nor did they appraise separately the several items of property included in their appraisement, but valued the whole of the property at once and in gross including the several matters herein after mentioned; and the appraisers included in their appraisement as appertaining to the mills divers matters and things which did not appertain; and particularly they included the dam and raceway; the house for storing barrels; the road leading to the mills on the easterly side of the river, and the road leading to the store-house on the westerly side; the floating foot bridge across the river near the mills; a wire screen for cleaning grain, but which was then of no use; and also, certain licenses to use machinery, called patent-rights, with seven run of stones, (although there were but six in the mill,) which licenses, it was alleged, had theretofore been procured by the lessees. The appellants submit, that none of the matters and things last above mentioned, ought to be considered as appertaining to the mills.

Although the appraisers did not value separately the items of property appraised by them, as appertaining to the mills, yet they allowed some large sum of money more

than they would have allowed, if they had not considered the items of property last above mentioned, or some of them as appertaining to the mills.

An entire new dam and raceway, similar to those built by the lessees, and an entire new grist-mill and saw-mill of the same dimensions, and with the same run of stones with those built by the lessees with all the requisite machinery, might have been built, at the places where the dam, raceway, and mills were built by the lessees, at the time of the appraisement for twelve thousand dollars; or for some other sum less than eighteen thousand dollars.

The appellants submit that the appraisement is erroneous, excessive, unjust, and void.

During the continuance of the term the lessees committed and suffered great waste and destruction to the premises, and to the mills and buildings standing thereon at the commencement of the term, and to those erected during the continuance thereof; and particularly the lessees tore down and destroyed the dam and one of the mills, standing on the premises at the commencement of the term; and suffered the other of the mills, and the raceway, and road leading to the mills, to fall into decay. The lessees, also opened the before mentioned quarry; whereby the adjacent ground, which was an eligible seite for building vessels, and for piling wood, to be transported to New-York, has been washed away, and become entirely unfitted to built vessels, and will require very considerable expense to be made fit to pile up wood. The lessees, before they surrendered up the premises, tore down a house, and took the roof from off a waggon shed, both of which had been built on the premises during the term, and converted to their own use the materials thereof.

The respondents, (although required,) did not deliver up the possession of the mills until the 13th August, after the expiration of the term; nor of the dwelling house, and the rest of the premises until the 24th of August.

The appellants submit, that the amount of the damages occasioned by the waste committed and suffered by the lessees, by the cutting and carrying away of timber and wood by the lessees, and by withholding the possession of the premises, ought to be deducted from the amount at which the mills and appurtenances should be appraised.

Although the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, in the lifetime of Pierre Van Cortlandt, declined to pay the amount of the said appraisement, because they considered it as unjust, excessive, erroneous, and void; yet they were always ready and willing, and offered, to pay the real and true value of the mills, and whatever appertained thereto, and of the other buildings, according to the provisions contained in the lease; and were also ready and willing, and offered, to join in any fair and equitable mode of causing the same to be appraised and valued.

The appellants are also ready and willing, and offer, to pay the respondents, upon their establishing their right to receive the same, the just and true value at the expiration of the term, of the mills and whatever appertained thereto, and of the other buildings, according to the provisions contained in the lease; and they are ready and willing, and offer, to join in any measures for ascertaining the value thereof, which the court may deem reasonable, fitting, and proper.

On the 21st of September, 1813, the respondents filed their bill against the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, to compel the payment of the amount of the appraisement; and since the death of Pierre Van Cortlandt, they have filed their bill of revivor and supplement against the appellants.

The appellants pray that the appraisement, valuation, or report, may be vacated, annulled, and set aside, and that the value of the mills, and whatever appertained thereto, and of the other buildings, at the expiration of

the term, according to the conditions of the lease, may be ascertained in some proper manner to be directed by the court; and that the appellants may be allowed to set off against the amount of such appraisement the amount of the damages occasioned by withholding the premises, and by the waste committed by the lessees; and the value of the timber and wood cut and carried off by the lessees as before mentioned, for other purposes than those mentioned in the lease; and that the amount of those damages, and the value of the last-mentioned timber and wood, and also the value of the timber and wood used by the lessees in building the mills and other buildings, may also be ascertained and determined, in some proper manner to be decreed by the court; and that they may have such other relief as their case may require.

On the 16th of February, 1816, the respondents filed their answer to this bill, which answer, among other things, sets forth and contains, in substance, as follows, viz.

At the commencement of the term granted by the said lease, there were the following, and no other, erections on the premises, viz. The remains of an old grist-mill, so much decayed as to be unfit for use, which had not been used as a mill for many years, and some parts of which had been used as a stable; a small grist-mill, very much out of repair, and not worth continuing in use as a mill; the remains of a raceway thereto, very much decayed and out of repair; and the remains of a temporary dam, made by laying up loose stones, the greater part of which had recently been partly demolished and thrown down by the breaking up of the ice in the river every spring, and which dam, at the commencement of the term, was all, or mostly down; and two small dwelling-houses, very much out of repair, and which appeared to be old; both of which remained on the premises when possession was delivered up.

Shortly after the execution of the lease, the lessees entered upon the premises, and during the years 1792, and

1793, built a grist-mill, for manufacturing purposes, on the easterly side of the river, containing five run of stones; a saw-mill, two small dwelling-houses for their work people, a roofed cellar, a smoke-house, a barn, and blacksmith's shop, a dam across the river, partly above and partly below the old dam, and a raceway to carry the water to the mills, and, during the years 1794, 1795, 1796, and 1797, they built a dwelling-house, and two small outhouses attached thereto; an addition to the grist-mill, and introduced another run of stones therein; an addition to the barn, part of which was used as a waggon-house, another small dwelling-house to accommodate labourers, and made an alteration in the saw-mill, introducing another saw, which were all the buildings erected by the lessees during the term, except a house about eight feet square, near the grist-mill, and a barrack for hay, which were built in the year 1810.

About the years 1794, or 1795, the lessees made extensive improvements to the raceway, which were found necessary to make the same permanent and lasting.

All the timber and wood taken by the lessees from off the demised premises, or other lands belonging to the lessors, and used in building the dam and raceway, mills, and whatever appertained thereto, and other buildings, and for alterations and repairs made therein, amounts to about 6,616 feet, 6 inches, solid measure, and eighteen hemlock logs, as set forth in schedule A. annexed to the answer.

All the shingles, plank, and boards, and a part of the timber, (but how much they cannot set forth,) used by the lessees in the mills, dam, raceway, and other buildings, (except about 1,500 feet of oak boards and plank, and the shingles for the roof of a house fourteen feet square, included in the schedule,) were purchased or obtained by the lessees.

The gravel, stone, and earth, used in making the dam and raceway, were taken off the premises.

The respondents believe, that the principal raceway dug in the side of the hill, is about the length, and the parts made with timber, boards and plank, or composed of gravel and stone only, are about the length and distance alleged in the bill, but that there was another part of the raceway, about 300 feet long, not included in the principal raceway, and above the same, but connected therewith, which had not been so difficult in the construction as the principal raceway.

When the dam and raceway were building, the lessees used therein such of the stones which had composed the old dam, and were then lying in the river, as they found convenient and suitable; but what proportion thereof were so used, they cannot say.

The respondents deny, that the lessees tore down any part of the old dam, which was in a permanent state, or any other part of the old dam, except by taking such of the stones as had composed the same, and were then down in the river, or lying loosely together, but not making a dam, in any just sense of that word.

After the lessees had taken possession of the premises, and previous to the year 1797, the lessees took down a part of the timber of the frame of the remains of the old mill, and used the same in erecting a barrel house, and an addition to the barn; all the residue of the timber of the old mill, fit for building, was taken away by appellant, Philip Van Cortlandt, (but cannot say how much was so taken,) and all the residue of the frame of the old mill was consumed for firewood, or decayed and wasted.

The respondents deny that the lessees opened any quarry or mine on the premises.

They admit, that the principal part of the stone used for the foundation of the mills, were taken from the westerly side of the river, nearly opposite the mills; a considerable part of the said stone were loose in the bed, and on the side and margin of the river; for the greater

part of the said stone were split from off the side of rocks which projected into the river at the side and adjacent to the bed of the river; they cannot say what proportion was split from off the rocks. They believe no stone had been taken from that place at the commencement of the term.

During the years 1794, 1795, and 1796, the lessees made a considerable alteration in their grist-mill, but an entire alteration was not made, and the business in the mill was, thereafter, conducted on the altered plan.

The respondents admit, that a raceway might have been constructed for the use of a mill containing machinery similar to that in the grist-mill after the alteration, for less money than the raceway actually cost, but how much less they cannot state, but that a raceway as suitable, permanent, and valuable, for the milling business, as the one made by the lessees, could not have been made at that place for less money than the said raceway actually cost. The respondents are fully persuaded, and believe, that if the raceway had been constructed at the expiration of the lease, it would have cost, at least, *three times as much* as the said raceway actually cost, by reason of *the difference in the price of labour*.

The lessees kept no separate account of the cost of the grist-mill, and machinery, or saw-mill, or dam and raceway, separate from the cost of the other buildings and improvements, so as to be able to ascertain their separate costs; but that an account of the whole expense of the buildings and improvements was kept.

The respondents cannot state the exact cost of the mills, dam, and raceway, including the alterations in the machinery, separately from the other expenses; but they are confident, and believe, that the dam, raceway, and mills, including the alterations in the machinery, cost, at least, 18,000 dollars.

They cannot state the expense of the machinery rendered useless by the alterations, as no account was kept thereof; but they do not believe the cost thereof exceeded 400 dollars.

Before, and at the time of the appointment of Nathan Anderson, it was understood, between the lessors and the respondents, that the proper mode of choosing the appraisers was for each party to choose one, agreeable to which understanding the lessors chose Nathan Anderson, in which choice the respondents concurred. They contend, that such appointment was in conformity to the lease.

On the 1st of May, 1813, the respondents chose and appointed Samuel Mott as an appraiser on their part, and gave the lessors notice thereof.

The respondents do not know, or believe, that the lessors were acquainted with the intention of the respondents to choose Samuel Mott as an appraiser on their part; but the lessors were fully acquainted with, and knew the determination of the respondents to choose an appraiser to act with, and assist, Nathan Anderson, and that they did not object to the appointment of Samuel Mott, but appeared satisfied therewith. The respondents are advised, that the appointment of Samuel Mott was made conformable to the covenants contained in the lease.

On the 1st of May, 1813, Nathan Anderson and Samuel Mott met on the premises, and spent the best part of two days in viewing the matters submitted to their appraisement, and conferring together thereon; they viewed the grist-mill and those matters which appertained thereto, and were pointed out and intended to be included in the valuation in a *critical manner*, and sufficiently to make up a correct judgment of their value; and also the other buildings, sufficiently to form a correct opinion that they were worth more than 500 dollars.

The appellant, Philip Van Cortlandt, and Theodorus C. Van Wyck, as the agent of Pierre Van Cortlandt, deceased, were in company with the said appraisers the greater part of the time they were viewing the matters submitted to them; and Van Wyck was very assiduous in pointing out pretended defects, which he represented as lessening the value of the matters to be appraised; but the appraisers, and even the appellant, Philip Van Cortlandt, appeared to consider the objections of Van Wyck as imaginary and unimportant.

The respondents admit, that Samuel Mott and Nathan Anderson did not minutely inspect the saw-mill and barrel house, because the respondents informed the appraisers that they were not submitted to them, or intended to be included in the valuation.

The respondents have understood from both Nathan Anderson and Samuel Mott, and believe that they conferred as to the value of the grist-mill and all those matters which appertained thereto, and that they could not agree in opinion as to the value thereof; and, also, that they had conferred together as to the value of the other buildings, but the respondents did not understand, nor do they believe, that there was any disagreement as to the value thereof, nor do the respondents believe but that they mutually agreed that the value thereof exceeded 500 dollars.

Nathan Anderson did, in the presence of the appellant, Philip Van Cortlandt, Samuel Mott, and the respondents, inform the appellant, Philip Van Cortlandt, and the respondents, that they, Nathan Anderson and Samuel Mott, had conferred on the business left to them, and had disagreed, or could not agree in opinion touching the value thereof. The respondents do not know whether such information was given by Nathan Anderson at the request of Samuel Mott, but think it possible it was, as Samuel Mott assented to the truth of Nathan Anderson's state-

ment. This disagreement the respondents then understood, and now believe, related to the value of the grist-mill, and whatever appertained thereto, and not to the other buildings.

Nathan Anderson and Samuel Mott appointed David Lydig for the third person, or appraiser, by a writing under their hands, which is set forth in the answer in hæc verba.

The appellant, Philip Van Cortlandt, previous to the appointment of David Lydig, but after he understood the appraisers could not agree, proposed David Lydig to the respondents as a suitable person for a third appraiser to assist Samuel Mott and Nathan Anderson, to which proposal the respondents agreed; and in consequence of the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, and the respondents uniting in opinion, and consenting that David Lydig should be chosen for the third appraiser, his appointment was made by Nathan Anderson and Samuel Mott, in conformity with the wishes and consent of both parties.

The respondents do not believe the meaning of the lease to be, that in case a third appraiser should be chosen, he should be chosen as an *umpire;* but they always understood, and still believe, the true meaning of the lease to be, that such third appraiser should be chosen to assist the other two: and such was the understanding of Samuel Mott and Nathan Anderson, the lessors and respondents at the time David Lydig was chosen, and so expressed by the appellant, Philip Van Cortlandt, and the respondents, and assented to by Theodorus C. Van Wyck, the agent of Pierre Van Cortlandt, and no objection was made at the time of David Lydig's appointment, nor afterwards, during the whole course of the business, against the appraisement being conducted in that manner; or to David Lydig's acting with and assisting Nathan Anderson and Samuel Mott in making up an appraisement; nor was any suggestion made that David Ly-

dig ought to act separately or alone by the appellant, Philip Van Cortlandt, or Theodorous C. Van Wyck, the agent of Pierre Van Cortlandt.

At the time of David Lydig's appointment, the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, were fully acquainted with the manner of such appointment, and knew that he was to act with, and assist Samuel Mott and Nathan Anderson; and was not chosen as an umpire.

On the 8th July, 1813, the appraisers, to wit, David Lydig, Samuel Mott, and Nathan Anderson, and the appellant, Philip Van Cortlandt, and Theodorus C. Van Wyck, the agent of Pierre Van Cortlandt, and the respondents met on the premises; the appraisers viewed, in a careful and satisfactory manner, the grist-mill, and all those matters which appertained thereto, and were submitted to them; and also the other buildings, sufficiently to ascertain that their value exceeded 500 dollars.

The respondents admit that the appraisers did not view the saw-mill and barrel-house, because the respondent at the time stated that they were not intended to be included in the appraisement, nor do they believe they were.

The appraisers did, in the opinion and belief of the respondents, sufficiently examine the grist-mill, and the timber thereof, with respect to its soundness; and the machinery thereof, in regard to its soundness and ability to perform; and that the appraisers, or one of them, took, and kept an account of the matters submitted to, and viewed by them; but the respondents do not know whether they kept an account of the timber of the mill. All the six run of stones in the grist-mill were fully examined by the appraisers, or their goodness and value fully made known to them by the admission of the appellant, Philip Van Cortlandt, and Theodorus C. Van Wyck. The appraisers saw the grist-mill grind, and going, and had, there-

by, a fair opportunity of forming a correct opinion of the ability of the grist-mill and machinery to perform.

The respondents deny, that at any time whatever, any means were used, directly, or indirectly, to conceal from the appraisers the real and true state of repair of the grist-mill, or the matters and things appertaining thereto, and submitted to the appraisers.

The demised premises, and the buildings and improvements thereon, were more immediately under the control of the respondent, Abraham I. Underhill, for several years previous to, and at the expiration of, the lease, as he resided thereon with his family, and had the care of the business done in the mills.

The respondent, Abraham I. Underhill, states, for himself, that the milling business done in the grist-mill was brought to a close, and the mill ceased to be used about the last of April, 1813, after which time the mill was not used except to show to the appraisers her ability to perform, and to clear out the mills. He admits, that about the time the mill ceased to be used for manufacturing purposes, he directed the side of the cog-pit to be nailed up, (through which persons might otherwise have entered the mill when it was otherwise fully secured,) to prevent the machinery from being injured before the valuation, and to preserve the same, and for no other purpose whatever. The appraisers, or one of them, went into the cog-pit and examined the machinery therein, which was the proper method and place for the same to be sufficiently examined. He admits that the machinery in the cog-pit was important, and was included in the appraisement; but denies that it was the most costly, or expensive machinery belonging to the mill; or that it was in a decayed state, or bad repair; or that it was prevented, by the cog-pit being boarded up, from being sufficiently examined by the appraisers; or that the cog-pit was boarded up with a view, or for the purpose, of preventing the machinery therein from being critically examined by the appraisers.

The respondent, Abraham I. Underhill, further says, that some short time previous to the expiration of the lease, (but when in particular he cannot set forth,) and while he was engaged in *repairing the grist-mill*, he caused a bridge and platform across the raceway, (which had been used, for many years, to set barrels on when brought to the mill by waggons,) also to be repaired; and some boards were laid down and used in repairing the same, and a passage to the gates of the raceway; but he denies that any boards, or plank, were laid down, or carried over, the raceway, except for the purpose aforesaid, or that the appraisers were thereby prevented from examining that part of the raceway; the appraisers, or some of them, did actually examine that part of the raceway where the boards had been laid down and used as aforesaid. He denies that any of the timber and plank of the raceway was in a very decayed and rotten state.

The respondent, Abraham I. Underhill, further admits, that the roof of the addition to the grist-mill leaked in several places, but not so as to prevent the first floor beneath the roof from being used for the purposes for which it was originally designed. He also admits, that he directed small quantities of bran or shorts, to be placed in certain spots on the floor, under the roof, where the leaks were, which had been the constant practice from the time the leaks were discovered, to absorb the water which might fall on the floor; he thinks it probable there might have been small quantities of bran, or shorts, on the floor at the time the appraisers viewed the mills, and which had been placed there for the purpose aforesaid; but denies that the roof was then very leaky, and in bad repair; he also denies that bran, or shorts, were put on the floor to prevent the appraisers from knowing the real state and situation of the roof. When the appraisers were viewing the garret of the addition, the respondents stated to them, or one of them, that the roof leaked in some places, and

their attention was drawn thereto. He denies that the floor of the garret was *very much* stained by means of the leak; but admits there were several stains on the floor by reason thereof.

The respondent, Joshua Underhill, separately answering, with respect to the matter last above mentioned, gives a similar statement.

After the appraisers had viewed and examined the grist-mill, and those matters and things appertaining thereto, which had been submitted to them, sufficiently to make up a correct judgment of their value; and, also, the other buildings sufficiently to determine their value to be more than 500 dollars; and, also, after they had heard the proofs and allegations which were produced and offered by the parties; and, also, after they had conferred together on the subject of the appraisement for a considerable time, but before they had made up their report, or appraisement, Theodorus C. Van Wyck, acting as the agent of Pierre Van Cortlandt, deceased, requested of the appraisers time to produce witnesses to prove the actual cost of the dam and raceway. That David Lydig informed him he did not consider such testimony relevant, or necessary, as the appraisers were called to determine the value of the matters submitted to them, and not what they might originally have cost the lessees. Nathan Anderson and Samuel Mott did not object to the observations of David Lydig, but appeared to concur and agree therewith.

The respondents deny that Theodorus C. Van Wyck, offered to produce testimony to the appraisers touching the value of the things submitted to them; or that David Lydig refused to wait and hear testimony as to the value of the things submitted to the appraisers; or that David Lydig refused to hear any testimony which Theodorus C. Van Wyck offered, or pretended to be able to produce.

The defendants are ignorant of what passed between the appraisers when they were alone.

The respondent, Abraham I. Underhill, answering separately, says, he was invited into the room where the appraisers were conferring, by Samuel Mott; and that the appellant, Philip Van Cortlandt, and Theodorus C. Van Wyck, who were present when such invitation was received, went into the room with him, or immediately after he had entered the same; but he denies that he did at that, or any other time, have any *ex parte* communication with the appraisers upon the subject of the appraisement, while they were conferring on that subject. He admits that some question was asked him, by Nathan Anderson, relative to the cost of the dam and raceway, to which he answered, that he did not know what they had cost, as no separate account of the costs, by which he could ascertain the same, had been kept by the lessees, and only an account of the costs of the whole of the buildings and improvements. He denies that he did, at any time, make any false declarations to the appraisers respecting the matters submitted to them; or that he told any of the appraisers at that, or any other time, that the dam and raceway had cost 10,000 dollars; or that the mills, or the mills and whatever appertained thereto, had cost 10,000 dollars; or that he possessed no account of the expenses of the buildings and improvements. From what took place after he went into the room, he was led to believe that Samuel Mott, with the consent of the other appraisers, had called him into the room; and that the appellant, Philip Van Cortlandt, and Theodorus C. Van Wyck, made no objections to his being called into the room.

The respondent, Joshua Underhill, in answering to the matters above mentioned, makes a similar statement.

The dam, raceway, and mills, and whatever appertained thereto, cost more than 10,000 dollars, and in the opinion of the respondent, the same cost about 18,000 dollars, as near as they are able to calculate, as no separate account of the costs was kept by the lessees, only an ac-

count of the whole expense of the buildings and improvements, which amounted to about 20,000 dollars.

The respondents do not believe that the appraisers, or any of them, determined to appraise the matters and things submitted to them, at any sum whatever, previous to their having first ascertained what matters appertained to the grist-mill, and the value thereof.

The respondents have understood, and believe, the appraisers did ascertain and determine, previous to making up their valuation, what matters were to be considered as appertaining to the grist-mill; and that the appraisers, in making up their appraisement, valued separately the principal and important items of property included in the appraisement; and that the same were not appraised at once and in mass, or in the gross.

They deny that the appraisers included in their appraisement, any matter or thing which did not appertain, and which ought not to be considered as appertaining to the grist-mill.

They admit that the appraisers included in their appraisement, the dam and race-way; a smut machine and wire screen in the grist-mill, (which were then fit for use,) and also the patent right or license to use Evans' machinery in the grist-mill, with seven run of stones: but they do not believe, and therefore deny, that the appraisers valued the license for more than six run of stones; because they informed the appraisers they meant to make, and did make, a present to the lessors of the right to use machinery for one run of stones more than the mill then contained.

They do not believe, and therefore deny, that the saw-mill—or the floating bridge—or the barrel-house, were included in the appraisement, as the appraisers were informed by the respondents the same were not intended or submitted for valuation; nor do they believe that the roads mentioned in the bill, or either of them, were included in the appraisement.

They admit, that Theodorus C. Van Wyck, as the agent of Pierre Van Cortlandt, objected to the patent rights being included in the appraisement; and he also objected to the grist-mill being valued, and wished the same might be removed from off the premises by the respondents.

The defendants do not know whether the appraisers valued separately all the small items included in the appraisement, nor do they believe that was necessary, for men, acquainted with mills, to make up a correct judgment on the matters submitted to be appraised. They admit that the amount of the appraisement was increased by the items above mentioned being included, but cannot say to what amount.

In the judgment and belief of the respondents, the grist-mill, and whatever appertained thereto, including the dam and race-way, and excluding the other items above mentioned, exceeded in value 6,500 dollars, at the time of the appraisement, and that the same were worth full as much as the amount at which they were appraised.

The respondents do not believe that an entire new dam and raceway, similar to those made by the lessees, and as permanent, suitable, and valuable, and an entire new grist-mill, and saw-mill, of the same dimensions, and equally good, and with the same number of run of stones, and with all the requisite and necessary machinery, could have been built at the place where the same were erected by the lessees, at the time of the valuation, for less than 30,000 dollars.

The respondents deny that the lessees committed, or sufferred any waste, during the continuance of the term, as alleged in the bill. They admit that the little mill, and so much of the raceway belonging thereto, as was then remaining, and the road, leading thereto, being useless, and of little value, were not kept in repair, for the reasons above mentioned; and that the mill-frame, and the materials belonging thereto, and certain articles belonging to

the little mill; and the loose stones, which had formed a temporary dam, were used and disposed of, as herein before mentioned, which the respondents contend the lessees were authorized to do, and that the same was done with the consent and approbation of the lessors, or one of them.

The respondents deny that any land, adjacent to the place where the lessees procured the principal part of the stone used in the foundation of the mills, was washed away by the river, and materially injured by reason of the lessees' having removed the stone used by them; or that the land has been washed away, or injured, so as to unfit it for such purposes as it was ever fit for. The respondent, Abraham I. Underhill, says, that if any injury was done to that place by the washing of the river, it was owing to the blasting and breaking out stones for the foundation of the mill, built by the appellant, Philip Van Cortlandt.

The respondents admit that possession of the premises was not delivered until the times mentioned in the bill, but contend, that they had a right to hold the possession until the amount of the appraisement was paid.

To this answer a general replication was filed. On the 27th day of May, 1816, the following order was entered in the cross suit, viz.

Order to amend cross bill.

Philip Van Cortlandt, and others, against *Abraham I. Underhill, Joshua Underhill, Nathan Anderson, Samuel Mott, and David Lydig.*

On motion of Mr. Monro, of counsel for the complainants, it is ordered that the complainants have leave to amend their bill of complaint, in this cause, by striking out the name of Nathan Anderson, as a defendant, and such of the allegations contained in the said bill of complaint, as relate to the said Nathan Anderson, and tend to charge him as a defendant thereto.

On the 31st day of May, 1816, the following notice was served upon the solicitor, for the respondents, in the cross suit, viz.

Notice that cross bill had been amended.

IN CHANCERY.

Philip Van Cortlandt, and others, against *Abraham I. Underhill, Joshua Underhill, Nathan Anderson, Samuel Mott, and David Lydig.*

Sir,

Please to take notice, that pursuant to an order made in the above cause, on the 27th day of May, instant, the complainants have amended their bill of complaint, in the said cause, by striking out the name of Nathan Anderson, as a defendant, and such of the allegations contained in the said bill of complaint as relate to the said Nathan Anderson, and tend to charge him as a defendant thereto; and you will further please to take notice, that the complainants require no further answer from the defendants, Abraham I. Underhill, Joshua Underhill, Samuel Mott, and David Lydig, or either of them, and are ready to amend their copy of the said bill of complaint. Dated the thirtieth day of May, 1816.

Yours, &c.,

Wm. N. Dyckman, Jun.
Solicitor for the Complainants.

To Robert P. Lee, Esq. Solicitor for Defendants, Abraham I. Underhill, Joshua Underhill, Samuel Mott, and David Lydig.

Testimony on the part of the respondents.

The testimony on the part of the respondents in the original suit, consists of exhibits, A, B, C, D, E, and F; and the depositions of Samuel Mott, David Lydig, Robert Underhill, Jesse Field, James Burling, Richard I. Field, Phebe Field, Henry I. Wyckoff, John Townsend, William

Thorn, Edmund Kirby, Peter Mesier, Jacob Wood, and Richard Mott.

Exhibit A, is the conveyance from Thomas Burling, and William Burling, to the respondents and Robert Underhill, dated the 5th day of February, 1799, mentioned in the original bill of the respondents. Exhibit A.

Exhibit B, is the conveyance from Robert Underhill to the respondent Abraham I. Underhill, dated the 1st day of May, 1804, mentioned in the original bill of the respondents. Exhibit B.

Exhibit C, is the conveyance from the respondent, Abraham I. Underhill, to the respondent, Joshua Underhill, dated the 2d day of May, 1804, mentioned in the original bill of the respondents. Exhibit C.

Exhibit D, is the agreement between the respondents, dated the 19th day of April, 1806, mentioned in the original bill of the respondents. Exhibit D.

Exhibit E, is the letter written by the respondent, Abraham I. Underhill, to the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, dated the 30th day of January, 1813, mentioned in the original bill of the respondents. Exhibit E.

Exhibit F, is the appointment of David Lydig, by Nathan Anderson, and Samuel Mott, mentioned in the answer of the respondents to the appellants' cross bill, and therein set forth in *hæc verba*. Exhibit F.

Samuel Mott testifies as follows, viz. Testimony of Samuel Mott.

To the 8th interrogatory, the deponent proves the signature of himself and Nathan Anderson to Exhibit F.

To the 11th interrogatory, the deponent was the person chosen by the respondents, as one of the appraisers, as mentioned, and inquired of in the said interrogatory. Previous to the appointment of David Lydig, as the third person mentioned and referred to in the said interrogatory, the deponent, and Nathan Anderson, the other appraiser,

took a view together of the mills and appurtenances, and other buildings inquired of, in said interrogatory; and the deponent also took a separate view thereof, as did also Anderson, previous to the appointment of David Lydig, before mentioned. The deponent, considering the business as pretty important, took, what he considered, the requisite time for examining the premises, on each of the occasions aforesaid, and, to the best of his recollection, it took about one or two hours, at each time, in making the view aforesaid. The deponent and Anderson conferred together, relative to, and about the value of the premises, aforesaid, previous to the appointment of Lydig; and finding, upon such conferrence, that there was no likelihood of Anderson and the deponent coming to an agreement about the value of the said mills, appurtenances, and other buildings, it was proposed, but by which of them, he does not recollect, to choose a third appraiser: the deponent and Anderson then proceeded to the choice and appointment of a third appraiser, and they thereupon readily and cordially agreed, to the choice and appointment of the said David Lydig, and the same was done with the entire acquiescence of the deponent and Anderson.

To the 12th interrogatory—After the appointment of David Lydig, as above mentioned, they, the aforesaid three appraisers, previous to the making up of their report, proceeded to view and examine the said mills, and whatever appertained thereto, several times, and with particular attention; and, at the same time, proceeded to hear the proofs, if any, and allegations, of the parties, on both sides. The respondents attended the said appraisers in person; and Theodorus Van Wyck attended at the same time, as the agent of the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, together with the appellant, Philip Van Cortlandt. The deponent does not recollect of any proofs being offered or submitted by either party; but that the allegations, on both sides, were heard

by the said appraisers; and the said parties, and their agents, as aforesaid, were asked by the said appraisers, if they had any thing more to offer or produce to them, the said appraisers, before they retired to make up their report, to which the said parties, and agent, answered, that they had nothing further to offer.

To the 13th interrogatory—All the deponent can recollect, relative to the matters inquired of in the said interrogatory is, that there was some application of the kind made by one of the parties, but which of them, does not recollect, and he remembers, that on the said occasion, both parties were called in, to be present, and were present, in order to have the statement, whatever it was, but the deponent does not recollect the nature thereof. The deponent is certain that no such statement was made to the appraisers, except in presence of both parties, or of some one of each party, or their agent.

To the 15th interrogatory—After the said appraisers had retired, in order to make up their report, the deponent recollects, that the respondents, together with Theodorus C. Van Wyck, the agent of the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, were admitted into the room, where the said appraisers had retired, in order to make a statement of something which they, the said parties, said had been forgot: but the deponent does not remember of any conduct, on the part of Van Wyck, particularly intrusive, or calculated to interrupt the said appraisers, though his general conduct towards them was not very respectful. Upon reflection, the deponent recollects, that Van Wyck, at the time of his appearing before the appraisers, as last mentioned, asserted, that the mill-dam, included in the appraisement, had not cost as much money as the respondents had intimated, and that that could be shown as a fact, and urged the appraisers to take the said circumstance into consideration; to which the said appraisers answered, that they

conceived it to be their business to value the said property, not according to what they cost, but according to their present value, and therefore declined to take into consideration the circumstance urged as aforesaid by Van Wyck.

Cross-examined.

To the 4th cross interrogatory—The deponent, as one of the appraisers before mentioned, when he undertook the examination of the mills, and appurtenances, and the other buildings referred to, made a general and minute examination of the same; in doing which, he examined the machinery appertaining to the said mills, in order to ascertain the state of repair, and value of the same. He also examined the mill-stones, and the bolting cloths, in the said mills, for the purpose aforsaid. He also examined the raceways appertaining to the said mills, in order to ascertain whether the same were built and constructed in the best manner, and also to ascertain their state of repair; and he also examined the other buildings erected upon the said premises, so as to ascertain their condition and state of repair. Nathan Anderson, the other appraiser, was present with the deponent, and joined him in making the examinations above mentioned, at one time; but the deponent, at another time, as such appraiser, repeated the said examination without the presence of Anderson. As the deponent has before mentioned, he and Anderson, conferred together, relative to the matters in question, previous to the appointment of David Lydig; that they each affixed a particular value upon the said mills, and appurtenances, and the other buildings, and communicated the same to one another; at least the deponent recollects, that he communicated his valuation to Anderson; and he remembers that they did not, and were not able to agree on the subject; but he does not recollect what was the amount of

their respective valuations, though he remembers that they disagreed relative to all the subjects of valuation.

To the 5th cross interrogatory—The deponent saith, that after the appointment of David Lydig, they, the said appraisers, met together, some time in the month of June, in the same year, and proceeded to make, and did make, a thorough and particular examination of the mills, appurtenances, and other buildings, in much the same manner as the deponent, and Anderson, had done before, as above related; and that upon making such examination, they examined in a particular manner the foundations of the said mills, and of the other buildings, and the timber composing the frames of the same, so as to ascertain their condition and state of repair; that he remembers they had some of the timber in question cut, in order to ascertain the soundness of the same, particularly the floor beams; but he does not recollect that the dimensions of the said mills, and other buildings, were measured on that occasion, they, the said appraisers, being informed, by both parties, of such dimensions; and the deponent further saith, that he remembers they, the said appraisers, also examined, on that occasion, the water wheels, cog wheels, and other wheels, and the shafts of the same, and other parts of the machinery, so as to ascertain their condition, fitness, and state of repair; but he does not recollect that the shafts, aforesaid, were cut or bored, in order to ascertain their soundness; that they, in like manner, proceeded to examine the bolting cloths, and mill stones, the latter of which they caused to be taken up for the purpose of examining the same, but he is not certain that all the mill stones were taken up; that they also examined the raceways in question, so as to ascertain their condition and state of repair; and the deponent further saith, that he does not remember the particular sums at which they, the said appraisers, valued each of the said mills, appurtenances, and buildings as inquired of, as he did not keep memorandums

thereof; that, in making their valuation, the premises which were to be included therein, together with the appurtenances, were pointed out to the appraisers by the parties concerned; and that the licenses, or patent rights, as mentioned in said interrogatory, were considered as part of the machinery, and as appurtenances of said mills, and were comprised in the valuation accordingly; that he remembers there was a complete set of said licenses, or patent rights, but he does not know at what sum they valued the same, nor does he know of their being distinct and separate licenses, or patent rights, as inquired of in the said interrogatory, nor does he know that there was a separate right for every run of stones; and to the other queries in the said interrogatory, relative to the said licenses, or patent rights, the deponent cannot depose, as he recollects nothing on that subject; the deponent does not recollect of any allowance having been made for the stones composing the foundations of the mills, and other buildings, as inquired of; and, lastly, the deponent saith that, as they considered it their business to value the property in question as it then stood, they had no reference to any alterations, or repairs, as inquired of in the said interrogatory.

To the 8th cross interrogatory—The deponent saith, that he does not recollect any thing more, in particular, relative to Theodorus C. Van Wyck's appearing before the appraisers, than as he has already mentioned in his direct examination, nor does he recollect that any thing was said by him on the subject of the licenses, or patent rights, as inquired of in said interrogatory.

To the 9th cross interrogatory—The deponent saith, that he is neither a carpenter, mason, millwright, or other mechanic.

Testimony of David Lydig.

David Lydig testifies as follows, viz.

To the 19th interrogatory—The deponent saith, that

some time in the summer of the year 1813, he received a note in writing, signed by Samuel Mott, and, he believes, also by Nathan Anderson, though he is not certain as to the latter circumstance, informing the deponent that they had chosen him to act with them to value and appraise the mills and appurtenances mentioned, and referred to in the said interrogatory; but the deponent having mislaid the said note, is not able to recollect the particulars thereof. The deponent, together with Mott and Anderson, met, accordingly, on the premises sometime in or about the month of July, 1813, when they viewed the said mills, appurtenances, and other buildings, and particularly a raceway, of which they took a very particular view, on account of its importance, and the apparent labour and expense with which it had been made. That the parties interested in the appraisement attended on that occasion, except Pierre Van Cortlandt, deceased, who did not attend in person, but was represented by Theodorus C. Van Wyck, as the deponent then understood, and who attended in his place and stead; but the deponent is not certain that the appellant, Philip Van Cortlandt, was present all the time. The deponent further saith, that they, the said appraisers, before they made up their report, heard both parties, that is to say, the respondents in person, and the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, either in person, or by Theodorus C. Van Wyck, the agent, or representative aforesaid, of them, or one of them. The deponent does not recollect that the said parties were particularly asked by the appraisers, or either of them, if they had any thing further to offer, as is inquired of in the said interrogatory; but the deponent well remembers, that the said appraisers, previous to the making up of their report, sat, and waited a considerable time, in order to give all the said parties time and opportunity to offer such statements and allegations, and produce such proofs, as they might have in their power, rela-

tive to the costs and value of the said mills, premises, and appurtenances, The deponent does not recollect that any of the said parties asked for further time for the purpose aforesaid; and he is certain, that if they had requested such further time, the said appraisers would have allowed it.

To the 14th interrogatory—The deponent saith that, to the best of his recollection, he thinks that, after the aforesaid parties had withdrawn and left the said appraisers to themselves, in order to make up their report, the said appraisers sent for the respondents, or one of them, to ask them if the other mill, to wit, the mill in the possession of the appellant, Philip Van Cortlandt, was to be included in the appraisement; and he also recollects, that the appellant, Philip Van Cortlandt, was also sent for at the same time, for the purpose of asking him the same question, and that they, the said parties, came accordingly, but whether they were both present at the same time, on that particular occasion, the deponent does not recollect, but he very well remembers that both the said parties did, upon that occasion, consent that the other mill, aforesaid, should be included in the said appraisement; but further to the said interrogatory the deponent cannot depose.

To the 15th interrogatory—The deponent saith, that he does not recollect that the aforesaid Theodorus C. Van Wyck came before them, the said appraisers, while they were deliberating or making up their report, more than once, and that he does not remember whether or not his coming, as aforesaid, was considered by the arbitrators as intrusive, nor does he recollect for what particular purpose he so came.

To the 20th interrogatory—The deponent saith, that he does not recollect, nor does he believe, that the said appraisers at any time refused to receive further testimony, offered, or ready to be offered, by either of the parties, or by the said Theodorus C. Van Wyck, relative to the

matters in question, as long as the said testimony or statement appeared to have any bearing on the said appraisement; that no witnesses were produced or offered for the purpose of proving the cost or value of the premises in question; and further to the said interrogatory he cannot depose.

CROSS-EXAMINED.

To the fifth cross interrogatory—The deponent saith, that, as he has already mentioned in his answer to the 19th direct interrogatory, he, together with the other two appraisers, met on the premises in question, and the deponent, and Mott and Anderson, then proceeded to view and examine the mills, buildings, and appurtenances in question, together with the raceway; and the deponent further saith, that they examined, on that occasion, the said mills, and the appurtenances, in a pretty careful manner, and he remembers that they viewed the foundations of the mills of the respondents, but he does not recollect of examining the foundation of the other mills, or the foundation of the other buildings, nor does he recollect that the timber composing the frames in question was examined in the particular manner inquired of in the said interrogatory, but he remembers that they carefully viewed the same, and the deponent recollects that the dimensions of said mills and buildings were ascertained by the appraisers, by inquiring of the parties, who, accordingly, informed them of the said dimensions. The deponent saith, that the wheels in question were viewed and examined into on that occasion, and he recollects making inquiries as to the length of time the water wheels had been running, in order to ascertain their condition, but that he does not recollect that any of the *wheels* aforesaid, or *shafts*, *were bored*, as inquired of in the said interrogatory. The deponent remembers that the mill-stones in question, and bolts, were examined and taken into consideration, but he does not recollect that

every bolt and every stone was particularly examined. The deponent further saith, that the raceway, or ways in question, were particularly examined, and were found to be *in good order.* The deponent is not able to recollect the *particular sums* at which they valued each of the said mills, appurtenances, and buildings, as inquired of in the said interrogatory, but he thinks the same are particularly stated in the award; that certain *patent rights*, as mentioned in said interrogatory, were considered by them, the said appraisers, as appurtenances to said mills, and they considered the said patent rights as *embracing each and every run of stones then in the mills* of the respondents, and more particularly to the said interrogatory, as to the *number and value of the patent rights* in question, the deponent is not able to depose other than as he has already mentioned, and that he does not recollect of any particular evidence being produced as to the respondents possessing said patent rights, it being a thing admitted by both parties, and he remembers that *Mr. Van Wyck, or one of the parties, made some objections to paying for the said patent rights;* and the deponent further saith, that the said appraisers did not allow any sum of money for the *stones of the foundations* of the mills and buildings, nor does he recollect that any sum was allowed for *alterations or repairs* in the said mills, dams, and raceways, as inquired of in the said interrogatory.

To the eighth cross interrogatary—The deponent saith, that he has already answered the matters inquired of in the first part of the said interrogatory in his deposition to the fifteenth direct interrogatory, but the deponent does not recollect the particular reason Van Wyck alleged for appearing before the appraisers, as particularly inquired of in the said interrogatory.

To the tenth cross interrogatory—The deponent saith, that he is neither carpenter, mason, millwright, nor any other mechanic.

Testimony of Robert Underhill.

Robert Underhill testifies as follows, viz.

To the 16th interrogatory—The deponent has been pretty well acquainted with Samuel Mott for about twenty years; his reputation and standing in society as a man of probity, capacity, and discretion, is unexceptionable; the deponent has always considered him, and he believes he is generally considered and esteemed, a good and competent person to form a judgment of the value of mills, and their appurtenances, on account of the experience he has had in the milling business.

To the 17th interrogatory—The deponent is not personally acquainted with David Lydig, though he has seen him once. The deponent used to hear him frequently spoken of, as a man extensively engaged in establishing mills and manufacturing flour, and has understood him to be an active and intelligent man; for which reasons the deponent is of opinion that the said David Lydig is a competent person to form a correct estimate of the value of mills, and their appurtenances.

To the 18th interrogatory—The deponent has been acquainted with the mills in question from the time they were first began to be built, and he assisted in erecting the same; he is also acquainted with the appurtenances and other buildings. The deponent, from his intimate knowledge of the mills and appurtenances in question, (he having, in the year 1804, an interest in the same, which he afterwards sold out,) is of opinion that the same were worth, on the 1st day of May, 1813, not less than between seventeen and eighteen thousand dollars.

CROSS-EXAMINED.

To the second cross interrogatory—The respondents are brothers of the deponent.

To the sixth cross interrogatory—The deponent saith, that about the period of time when the mills, buildings, and appurtenances, were appraised as before mentioned,

he used frequently to be on the premises, and, occasionally, in the mills, and that although when he was in the said mill, on the occasions aforesaid, he took a general view of the condition thereof, yet he did not bestow a minute examination on every part of the same, such as the condition of the bolting cloths and gudgeons, but that, as he had been concerned in building the said mills, as he has before mentioned, he generally, when he visited the same, felt some curiosity to see the state of the wheels and machinery, and to observe what parts of the same remained as before, and what repairs and additions had been made thereto by the respondents; and the deponent does not recollect perceiving any deficiency therein, and the whole establishment appeared to be kept in pretty good repair. And the deponent further saith, that there was a saw-mill on the premises in question, at the period inquired of, which had not been used for some time, and had gone considerably to decay; that the dimensions of the grinding-mill were fifty-one feet by sixty; that the saw-mill was calculated for two separate saws and carriages; and that the barrel-house and cooper's shop were not large; and the deponent saith that, in viewing the mills, as before mentioned, he observed that a new sill had been put under one side of the said mills, and he believes that one of the girders, or floor beams, was not sound when it was originally put in at the erection of the mills; that as to the mill-stones, the deponent knew them to be good when first put in, and that they were also good in the year 1804, and the deponent has no reason to suppose that they were not good at the time of the appraisement aforesaid, though he did not examine the same; that he believes the raceways were also in good order, though the view he took of them was general; that the shafts appeared to be as good as ordinary, but that he did not see the same, nor the frames composing the buildings, bored, as inquired of in the said interrogatory, though he has understood that the appel-

lant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, the year after the appraisement, found it necessary to have a new shaft made for one of the water-wheels, and they also had to repair one of the cog-wheels. And the deponent saith, that the mills and buildings in question were erected about the year 1792 and 1793; and the deponent further saith, that he being originally the owner of one third part of the mills and premises in question, he sold his said interest to one of the respondents, in the year 1804, for six thousand dollars, which he considered a fair and a reasonable price, and that afterwards an improvement was made by raising the stone foundation of the additional part of the mill by putting stones in the place of pine logs which they had bought; and the deponent saith, that as to the particular value of each of the buildings in question, he is not able to form an estimate; that he considers the patent rights mentioned in said interrogatory as appertaining to the said mills, but he does not recollect the value of the same, nor how much was originally paid therefor, nor the particular number of them, but that a set in question was purchased for a mill carrying six run of stones.

To the seventh cross interrogatory—The deponent saith, that he was one of the co-lessees, as inquired of in the said interrogatory, and that the mills, dam, and raceway, were begun in the year 1792, but the same were not completed till between three and four years afterwards, the raceway being a very difficult, laborious, and expensive operation, as it was dug along the side of a very high and steep bank or hill, which fell in, by means of the rains and frosts, at two different times, filling the raceway nearly full the greatest part of the way with earth, rocks, and stones, so that it was between three and four years before the same became fixed and in good order; and the deponent further saith, that part of the timber used in erecting the mills and appurtenances in question was procured

from off the demised premises, such as some of the smaller timber used for the dam and flues, but that the rest of the timber used in building the mill and dam, and other buildings, was procured from other lands belonging to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, and which timber land was pointed out by them for that purpose, but that when they, the lessees, enlarged the mill, they sawed up a number of logs, for that purpose, of their own, which they had bought of other persons, and that a large flume, near a hundred feet in length, and one of the small dwelling-houses, were built with considerable proportion of pine timber, purchased by the lessees, and the large dwelling-house also contained a considerable proportion of pine, in like manner; that most of the stone used for the foundation of the mills, the dam, raceway, &c. was taken from the demised premises, and the rest was taken from other lands of the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, which they pointed out, but the deponent saith, that he knows of no compensation being made to them for the timber and stone above mentioned, and that he is not able to recollect, nor does he believe it is in his power to ascertain the true and actual costs of building and erecting the said mills, dams, raceway, and other buildings, as inquired of in the said interrogatory; but the deponent fully believes, according to the best of his knowledge and recollection, that the actual cost of making and erecting all the premises aforesaid, was between fifteen and twenty thousand dollars, but the particular cost of the whole, or of each separate building, &c. he is not able to state or ascertain; but the deponent saith that, at the time of erecting the premises, materials were much cheaper than afterwards, and that the best labourers were to be hired for three shillings per day, and finding them with provisions, house-carpenters from four and six-pence to five shillings, and millwrights from six to eight shillings. And the deponent fur-

ther saith, that he does not believe that he ever declared, or said, that the making of the principal raceway in question cost the sum of only one thousand dollars, because he always believed, since it was finished, that it cost a great deal more; that he has not seen, for twelve years past, the books, accounts, and memorandums inquired of in the said interrogatory, nor does he know in whose possession the same are, or have been, for some years past, nor what has become of the same.

To the eleventh cross interrogatory—The deponent saith that, in erecting the mills, dams, &c. the lessees aforesaid used some of the timber growing on the demised premises, as he has already mentioned, and that the timber that was afterwards used for making alterations, additions, and repairs, to and in the mills, and whatever else appertained thereto, was procured from other lands belonging to the defendant; that, from the year 1794 until 1804, some timber was used almost every year for repairs, but the particular quantity so used, or particular times when taken, he does not recollect; and that in widening the mill, the timber was procured, not from the demised premises, but from other lands belonging to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, but the stone was taken from the demised premises; that the said timber, or rather the greatest part of it, was procured from a piece of timber land belonging to the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, about two miles off, which they described as on the hill above Staats Williams, but the deponent is not able to form an estimate of the value of the timber so used for repairs, additions, &c.; he, however, thinks, according to the best of his recollection and judgment, that the value of the whole of the timber used, as before mentioned, in erecting, altering, and repairing the mills, and all other appurtenances, as the same timber stood growing, was about three hundred and fifty dollars.

Jesse Field testifies as follows, viz.

Testimony of Jesse Field.

To the 4th interrogatory—The deponent proves the execution of the conveyance marked Exhibit B, by Robert Underhill.

To the 6th interrogatory—The deponent proves the signature of the respondents to the agreement between them, marked Exhibit D.

To the 7th interrogatory—The deponent proves the signature of the respondent, Abraham I. Underhill, to the paper marked Exhibit E.

To the 9th interrogatory—The deponent saith, that a short time before the persons appointed to appraise the mills, &c. in question, came to the place for the purpose, the deponent went with the respondent, Abraham I. Underhill, to the house of the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, when the said Abraham handed to the appellant, Philip Van Cortlandt, a paper writing, purporting, as the deponent understood from the said Underhill, the authorising the appraisers to value the timber used in the mills, as inquired of in the said interrogatory; that the said Philip taking the paper, and appearing to look it over, then said, "well, what of all that," or words of that import, to which the said Abraham answered, that as the lease did not point out in what manner the value of the timber was to be ascertained, he thought it would be best for them to authorize the appraisers of the mills to value the timber also, or words to that effect, to which the said Philip replied, I will never sign another paper respecting the business, or words to that effect.

To the 16th interrogatory—The deponent saith, that he is acquainted with Samuel Mott, and has been acquainted with him between 20 and 30 years; that the reputation, and standing in society, of the said Samuel Mott, as a man of probity, understanding, and discretion, is fair and good; that he is a man of great experience in the milling busi-

ness, and building of mills, and is generally considered, as the deponent considers him, a good and competent person to form a correct judgment of the value of mills, and their appurtenances.

To the 17th interrogatory—The deponent saith, that he is acquainted with David Lydig, and that he has been acquainted with him a considerable number of years; that the said David Lydig is esteemed, in society, as a man of probity, good understanding and discretion, and has very great experience in the milling business, and in the building of mills; and from his experience, as aforesaid, the deponent considers him as a person perfectly competent to form a correct opinion of the value of mills and their appurtenances, as much so as any man in the state of New-York.

To the 18th interrogatory—The deponent saith, that he is well acquainted with the mills, appurtenances, and other buildings mentioned and referred to in the said interrogatory, the deponent having lived at, and near, the said mills for upwards of twenty years, and that, in his opinion, the value of the said mills, and whatever appertained thereto, and the other buildings, on the 1st day of May, 1813, was 13,500 dollars, including the dwelling house.

CROSS EXAMINED.

To the 2d cross interrogatory—The deponent saith, that he is related to the respondents, by the circumstance of the deponent's mother, and the mother of the respondents being half sisters; and, further, that the respondent, Abraham I. Underhill, married the deponent's daughter.

To the 3d cross interrogatory—The deponent saith, he did not examine the paper mentioned, and referred to, in the said interrogatory; and that the last time he saw it, was at the time when the said Abraham I. Underhill shew-

ed the same to the aforesaid Philip Van Cortlandt, as the deponent has before mentioned; and to the best of the deponent's recollection, the said Philip returned it, at the time, to the said Abraham, who brought it away with him; and the deponent saith, that he has already mentioned in his answer to the ninth direct interrogatory, all that he is able to recollect of what was said, or took place, by, and between, the said Abraham and Philip, at the time in question; and that he does not recollect that any other person was present at the time.

To the 6th cross interrogatory—The deponent saith, that, as to the mills and appurtenances in question, when the same were begun to be built, he was a partner with the respondents in the milling business, and personally assisted in building the said mills, and has often viewed and examined the same since, and particularly at the time when the appraisement in question was made; that to the best of the deponents recollection, when the said mill was first built, it was sixty feet long, and thirty feet wide; and that, afterwards, there was an addition of about twenty-one feet, to the best of his recollection, made to the width aforesaid, and the said mill contained six run of stones at the time of the appraisement; and the deponent further saith, that about the time when the appraisement in question was making, he examined the said mill and appurtenances, and the timber of the frames, and the shafts, water wheels, and other wheels, and machinery, together with the mill-stones and raceways; that he did not bore the said timber, but *it appeared to be sound*; that the shafts, wheels, and machinery aforesaid, appeared to be in good order, and the stones were equal in goodness to any mill-stones in the state, in the deponent's opinion, in proportion to their size; and that the raceway was firm and *in good order*, the same being a great and very expensive job. And the deponent saith, that previous to the said appraisement, the respondents had taken great pains, and had en-

ployed carpenters, and millrights, at a considerable expense, to put the said mills in good order; and the said millwrights were directed by the respondents, in the hearing of the deponent, to neglect nothing which should be necessary for putting the said mill in good order; and the deponent knows, from his personal knowledge, that new timbers were put into the said mill where the old ones were found defective; and the deponent does not know that there was any omission on that point, and he does not believe there was any such omission; and the deponent saith, that he thinks it was about nineteen years, at the time of the appraisement, since the said mills were first built, but that he does not recollect the particular time when the addition aforesaid was made to the same; and the deponent further saith, that in ascertaining the sum at which he has valued the aforesaid mills, and the appurtenances, he took into consideration the sum which the respondent, Abraham I. Underhill, gave to his brother, Robert Underhill, for his third part of the said mills and appurtenances, which sum was six thousand dollars; that the deponent then took into account the improved value of the premises, since the said Abraham purchased, as aforesaid, the interest of the said Robert, which improvements principally consisted of the repairs made to the mill-stones, and of the labour and expense in substituting a stone foundation for the wooden one on which the additional part of the said mill, before mentioned, had been built, and which was attended with considerable expense; and in addition to the above, the deponent also took into account the repairs made on the said mills previous to the appraisement, as he has before mentioned; and the deponent further saith, that he considers the raceway as one of the principal appurtenances of the said mills; and that he also considers as appurtenances, certain licenses, commonly called Evans' patent rights, seven of which the depo-

nent understood from the respondents, had been purchased by them, for the said mills, and which the deponent has understood were estimated, by the said Evans, at the time of the appraisement, at four hundred dollars for every run of stones; but the deponent does not know what was the cost of the said patent rights at the time they were originally purchased by the respondents.

Testimony of James Burling.

James Burling testifies as follows, viz.

To the 3d interrogatory—The deponent proves the execution of the conveyance from Thomas Burling, and William Burling, to the respondents, and Robert Underhill, marked Exhibit A.

The testimony of Richard I. Field discloses no new matter. The deponent only proving the execution of Exhibit B; the signature of the respondents to Exhibit D; the signature of the respondent, Abraham I. Underhill, to Exhibit E; and the signature of Samuel Mott, and Nathan Anderson, to Exhibit F.

Testimony of Phœbe Field.

Phœbe Field testifies as follows, viz.

To the 5th interrogatory—The deponent proves the execution of the conveyance marked Exhibit C, by the respondent, Abraham I. Underhill.

Testimony of Henry I. Wyckoff.

Henry I. Wyckoff testifies as follows, viz.

To the 16th interrogatory—The deponent is acquainted with Samuel Mott, and has known him six or seven years. The reputation and standing in society of Samuel Mott, as a man of probity, judgment, and discretion, is high and unexceptionable; he is a man of much practice and experience in the milling business, and is considered and esteemed as well qualified, and perfectly competent, to form a correct judgment of the value of mills and their appurtenances.

To the 17th interrogatory—The deponent has known David Lydig about twenty-five years, and has been personally acquainted with him about twenty years. The standing and reputation of David Lydig in society, as a man of probity, talents, and discretion, is high, and perfectly unexceptionable ; he has been for many years engaged in the milling business, and, from his experience in the same, the deponent considers him as a person fully competent to form a correct opinion of the value of mills and their appurtenances.

John Townsend testifies as follows, viz. Testimony of John Townsend.

To the 16th interrogatory—The deponent has been acquainted with Samuel Mott for about three years. The reputation and standing in society of Samuel Mott, as a man of honesty, judgment, and discretion, is fair and good ; he has been many years concerned in mills, and the manufacturing of flour, and from his experience in such concerns and business, he is considered and esteemed generally a good and competent person to form a judgment of the value of mills and their appurtenances, and, in the opinion of the deponent, he is fully competent to make such valuation.

To the 17th interrogatory—The deponent has been acquainted with David Lydig about thirty years. The standing and reputation in society of David Lydig, as a man of probity, talents, and discretion, is fair and good ; he has for many years been the proprietor of, and concerned in, mills, and the milling business, and in the opinion of the deponent, by reason of his experience in such business, he is fully competent to form a correct opinion of the value of mills, and their appurtenances, and the deponent believes he is generally considered so.

William Thorn testifies as follows, viz. Testimony of William Thorn.

To the 16th interrogatory—The deponent has been ac-

quainted with Samuel Mott between five and six years. The reputation and standing in society of Samuel Mott, as a man of probity and sound judgment, is fair and unexceptionable; he is a man of much experience, both in the milling business and in the building of mills, and is considered and esteemed a good and competent person to form a correct judgment of the value of mills and their appurtenances.

To the 17th interrogatory—The deponent has known David Lydig about nineteen years. The reputation and standing in society of David Lydig, as a man of probity, good understanding, and discretion, is good and unexceptionable, and, from his experience in the milling business, and in the building of mills, the deponent is of opinion that he is a person as competent to form a correct opinion of the value of mills, and their appurtenances, as any man in the state of New-York.

Testimony of Edmund Kirby.

Edmund Kirby testifies as follows, viz.

To the 16th interrogatory—The deponent has been acquainted with Samuel Mott as long as thirty years. As a man of probity, good judgment, and discretion, Samuel Mott has a good standing in society, and, from his long experience in the milling business, and in the building of mills, is considered and esteemed a good judge of the value of mills, and their appurtenances.

To the 17th interrogatory—The deponent has known David Lydig about ten or fifteen years. The standing of David Lydig in society, as a man of probity, sound judgment, and discretion, is good, and, in the opinion of the deponent, on account of his great experience in the building of mills, and the milling business, is as good a judge of the value of mills, and their appurtenances, as any man in the city of New-York.

Peter Mesier testifies as follows, viz. Testimony of Peter Mesier.

To the 16th interrogatory—The deponent has been acquainted with Samuel Mott for, at least, ten years. The reputation and standing in society of Samuel Mott, as a man of probity, intelligence, and judgment, is high and fair, and, by reason of his great experience in the milling business and in the building of mills, is generally considered and esteemed a good and competent person to form a correct judgment of the value of mills and their appurtenances.

To the 17th interrogatory—The deponent has been acquainted with David Lydig thirty years. David Lydig, as a man of probity, intelligence, and discretion, has a high reputation and standing in society, and, by reason of his great experience in the building of valuable and extensive mills, in different parts of this state, the deponent is of opinion that there is no person in the country more competent to form a correct estimate of the value of mills, and their appurtenances, than David Lydig.

Jacob Wood testifies as follows, viz. Testimony of Jacob Wood.

To the sixteenth interrogatory—The deponent has been acquainted with Samuel Mott for about twenty years. The reputation and standing in society of Samuel Mott, as a man of probity and good judgment, is, the deponent believes, unexceptionable, and from his having been concerned for many years past in the building of mills, and in the milling business, the deponent thinks he must have acquired much experience therein, and he is, in the opinion of the deponent, on that account, a good and competent person to form a judgment of the value of mills and their appurtenances. The deponent presumes that this is the opinion, generally, of those who are acquainted with Samuel Mott, the deponent never having heard his competency as aforesaid questioned, except in the present controversy.

To the seventeenth interrogatory—The deponent has been acquainted with David Lydig twelve years and upwards, but not so intimately as with Samuel Mott. The deponent believes the standing and reputation in society of David Lydig is respectable; he has been for many years concerned in the building of mills, and in the milling business, and from the experience which the deponent thinks he must thereby have acquired, the deponent is of opinion that he is a competent person to form a correct opinion of the value of mills and their appurtenances.

Testimony of Richard Mott.

Richard Mott testifies as follows, viz.

To the sixteenth interrogatory—Samuel Mott is the deponent's brother, and has had much experience in the milling business, and in the building of mills, having been engaged in the former from his youth; on account of which, and from his good reputation as a man of probity, good judgment, and discretion, the deponent considers him a competent person to form a correct estimate of the value of mills and their appurtenances.

To the eighteenth interrogatory—The deponent knows the mills, appurtenances, and other buildings mentioned in the interrogatory, and has been intimately acquainted with them ever since they were built; he has often visited the said mills and appurtenances while they were in the possession of the respondents, and used frequently to view and examine the said mills merely from curiosity, arising from the circumstance of being himself a miller, and engaged in the same business as the respondents; the deponent has been told that the appraisers appraised the mills and appurtenances at 18,500 dollars, and, in his opinion, founded on his knowledge of the premises in question, the said appraisement does not exceed the real value of the said mills and premises.

To the last interrogatory—The deponent very well remembers, that when the respondents were about erecting

the mills in question, the project was considered by several persons of their acquaintanee, as a pretty hazardous undertaking, on account of the wildness of the situation, and the difficulty of making a raceway, and getting a permanent foundation for the building, and the making of which raceway was, in the deponent's opinion, a very laborious and expensive job.

CROSS-EXAMINED.

To the 2nd cross interrogatory—The respondents are cousins of the deponent's wife.

To the 6th cross-interrogatory—The deponent, as he has before mentioned in his answer to the direct interrogatories, used, occasionally, to view and examine the mills in question, and he has often been in the dwelling-house on the premises, and has lodged therein; he does not know from actual measurement the dimensions of the said mill, but he very well remembers hearing the miller say that it was sixty feet by fifty, and, from its appearance, the deponent has no doubt that such was about its true dimensions; but he does not recollect the exact size of the dwelling house in question. The deponent, previous to the time of the appraisement in question, as he has already mentioned, used frequently to go into and view and examine the mills and machinery in question, and he always found and considered the same in good order, and that this was the case as late as the spring of the year 1813, shortly before the appraisement, but that the deponent never viewed nor examined the said mills, &c. in reference to the said appraisement, nor did he ever particularly examine the timber of the frame of said mill, nor the mill-stones: and the deponent saith, that, to the best of his recollection, the mills in question were built from within one to two years from the commencement of the lease. And lastly, the deponent saith, that in making up his opinion of the value of the mill in question, he has taken into account the

whole machinery appertaining to the same, including certain parts of said machinery, commonly called patent elevators, the right to use which is purchased by the first proprietor; and the deponent supposes the same is continued to those who succeed to the possession of the mills; and the deponent has understood that, in purchasing said rights, a certain sum is paid for every run of stones contained in the mill, that being the standard by which the value of the use of the said right is estimated.

Testimony on the part of the appellant.

The testimony, on the part of the appellants in the original suit, consists of exhibits A, O No. 1, O No. 2, and O No. 3; and the depositions of Nathan Anderson, Theodorus C. Van Wyck, Thomas Burling, William Burling, Robert M'Queen, Justus Thorn, Scudder Waring, Walter Fowler, William Fowler, Adonijah Cock, John F. Hollman, Joseph Tompkins, Daniel W. Birdsall, James Diven, Jacob Doughty, Stephen N. Bayard, George Tompkins, Robert M'Cord, John Bise, Solomon Teller, John Peterson, and Garret Williams.

Exhibit A.

Exhibit A is a copy of exhibit O, No. 1, the original.

Exhibit O, No. 1.

Exhibit, No. 1, mentioned and referred to in the deposition of William Burling, is an account current between Thomas and William Burling, and Joshua Underhill & Co. which account, under date of July, 1793, contains the following item, to the debit of Thomas and William Burling, viz. "One half the amount of the cost of the mills at Croton—£1600 8 10½."

N. B. The date of the last item in this account, is the 18th of April, 1796.

Exhibit O. No. 2

Exhibit O, No. 2, also mentioned and referred to in the deposition of William Burling. is another account current, between Thomas and William Burling, and Joshua Underhill, & Co. which account, under date of the 4th of April, 1798, contains the following item to the debit of Thomas and William Burling, viz.

"One half amount of the prime cost of the mills at Cro-

ton, expended since the 1st of 3d month, (March) 1794—£1376 7."

Exhibit O, No. 3

Exhibit O, No. 3, also mentioned and referred to in the deposition of William Burling, is a paper containing accounts, and, amongst others, the following, viz.

"RECAPITULATION.

"Mills and improvements at Croton,	£5953	11	9
"Two sloops, - - - -	1054	9	6
"Stores on Crane wharf, - - -	1743	9	7
	£8751	10	10"

Testimony of Nathan Anderson.

Nathan Anderson testifies as follows, viz.

To the first interrogatory—The deponent is a farmer and mechanic, having been engaged in the milling business, and in cooperage.

To the third interrogatory—The deponent saith, that he was chosen and appointed, in the manner mentioned in said interrogatory, to appraise and value the mills and premises, particularly mentioned and referred to in said interrogatory, at the expiration of the term for which the same were leased. The paper writing marked with the letters N A, (deposited with the examiner,) will show the manner in which he was appointed such appraiser; the said paper writing being signed by Pierre Van Cortlandt, and Philip Van Cortlandt, and bearing date the 28th of April, 1813. (This is the paper set forth in hæc verba, in the answer to the original bill.)

To the fourth interrogatory—The deponent saith, that, previous to the appointment of David Lydig, as a third appraiser, the deponent and Samuel Mott, the other appraiser, took a general view of the mills, buildings, and appurtenances in question: that is to say, they viewed the grist mills, occupied by the respondents, and went into and under the same, but did not give them a minute examina-

tion; that they also looked at the dam and raceway, as well as the other buildings referred to, but, in the deponent's opinion, he and the said Samuel Mott did not, on that occasion, examine the said mills and appurtenances, in a manner sufficiently particular to enable them to form a just and correct estimate of their value; that, in making said examination, he does not recollect that they went into the cog-pit, which was nailed up, nor does he recollect that the mill-stones were turned up, in order to be inspected, though the deponent is not certain, but that they found one or two of the stones turned up. The reason why the examination aforesaid was not more particular and minute, was a suggestion, on the part of the said Samuel Mott, that he and the deponent were taking upon themselves too great a responsibility, in attempting an appraisement of said mills and premises, and that, therefore, it would be better to call in a third person, before they attempted to come to any determination relative to the appraisement.

To the fifth interrogatory—The deponent saith, that he and the said Samuel Mott, though they conversed together, touching the value of the mills and premises in question, previous to the appointment of David Lydig, yet that they did not undertake to affix any particular value thereon, or any part thereof, for the reason he has before mentioned; and he does not recollect of any sum or sums being proposed or suggested to him by the said Samuel Mott, touching the value as aforesaid, so that he does not remember of there being any disagreement between them, as to sums and values, because none were mentioned; and the deponent does not recollect that he was requested by Samuel Mott to inform the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, that he and the said Samuel had disagreed, or could not agree, as inquired of in said interrogatory, but the deponent has some impression on his mind, that they went together, and told either the respondents or the appellant, Philip Van Cort-

landt, and the said Pierre Van Cortlandt, deceased, or both, he does not recollect which, that they had not agreed; and that, therefore, they wished to have a third man to consult and decide with them, on the subject of said appraisement, but he does not remember that they assigned any particular reason therefor.

To the sixth interrogatory—The deponent saith, that the aforesaid David Lydig was chosen and appointed by him and the said Samuel Mott, to aid and assist in the valuation of the mills and premises in question, and the deponent did not consider him chosen, or appointed as an umpire, in relation to the matters in question.

To the 7th interrogatory—The deponent saith, that, at the time appointed for the view and examination of the premises in question, after the appointment of Mr. Lydig, the deponent did not arrive at the place till after the hour appointed, and he does not know what examination they had been making, previous thereto; that the deponent then joined them, and they proceeded to go round and walk over the premises, and to take a view of the different parts thereof; that they went into the mills occupied by the Underhills, and the same were put in motion while they were in the same; that they then went and looked at the mill occupied by John F. Hollman, under the Van Cortlandts, and also proceeded to view the other buildings, and the dam and raceway; that on the occasion aforesaid, they examined the foundation of the first-mentioned mills, but not of the others, nor of the other buildings; that they also took a general view of the timber, composing the frames of said mills, but they did not bore the same, though he remembers a knife was run into some part of the sleepers, which were found to be rotten; that, when under the mill, he observed that one of the sills was rotted, and part of a new one had been put in; that he does not recollect of going into the cog-pit, though he thinks they looked into it, through a small door, but the darkness of the place prevented their

having a full view thereof; that they also looked at the bolts. The deponent does not know of any measurement being made of the dimensions of either of said mills, or other buildings, nor was any account taken of the timber, composing the frames of said mills and buildings, though they took a view, as he before mentioned, of the machinery of the mills, but not, as he thought, in so particular a manner as was necessary to ascertain their real value. There was no particular calculation made of the value of the different and particular parts of the said mills and machinery, but only a general estimate of the whole together; and he is of opinion, that the view and examination, made as aforesaid, was not done in a manner sufficiently particular to enable them, the said appraisers, to form a just and correct estimate of the value of the property which they were to appraise.

To the eighth interrogatory—The deponent saith, that, in making the appraisement in question, they, the said appraisers, did not value each of said mills and appurtenances, and other buildings of the respondents, separately, that is to say, they did not appraise the different parts thereof separately; the said Samuel Mott and David Lydig, however, said, that they believed and were of opinion that the mill, raceway, and dam, must have cost twenty thousand dollars; upon which the deponent remarked, that he did not think that they could have cost as much as fourteen thousand dollars; whereupon it was proposed to call in the respondent, Abraham I. Underhill, in order to ask him what money had been laid out on the mill, dam, and raceway; and the said Underhill then stated, that they, the respondents, had laid out twenty thousand dollars on the same. The deponent finding that the said Mott and Lydig were for fixing the value thereof at twenty thousand dollars, and that they, being the majority, would of course charge the Van Cortlandts to that amount; and they having proposed to the deponent that they would put the value at eighteen thou-

sand dollars, instead of twenty thousand dollars, if he, the deponent, would concur with them, he accordingly agreed to said proposal, and said he would on that condition sign the appraisement; but told them, at the same time, that he thought the said sum of eighteen thousand dollars was far beyond the value of the said premises. The dwelling-house was valued at five hundred dollars; and that no other separate valuation was made or took place; and that as to the machinery, called patent rights, as inquired about in said interrogatory, he does not remember that there was any separate valuation made of them, nor does he recollect that any sum was mentioned respecting them; but that the same were considered as belonging to, and as appurtenances of, said mills; nor does he remember any thing about the respondents attempting to offer any evidence relative to said patent rights.

To the ninth interrogatory—The deponent saith, that, as he has before mentioned, the respondent, Abraham I. Underhill, was called into the room, where they, the said appraisers, were deliberating, for the purpose of being asked, as aforesaid, how much money they, the respondents, had laid out upon said mills and premises, and that this was done at the request of the deponent; he, the said Underhill, having been in a little while before, together with Van Wyck and Van Cortlandt, in order to state something about the appraisement of General Van Cortlandt's mill, and after they, the said persons, had retired, the deponent then proposed, that the said Underhill should be called in for the purpose of asking the question before mentioned, namely, how much money they, the respondents, had expended on the premises, and that this was the only time that he was alone before them, the said appraisers, while they were conferring together, and it was then that the said Underhill was asked the question aforesaid, and answered that they, the respondents, had laid out twenty thousand dollars. Upon which the deponent asked him for the ac-

counts, to which he answered, that he had none; and no other question being asked him, he went out of the room.

To the tenth interrogatory—The deponent saith, that Theodorus C. Van Wyck appeared before them, the said appraisers, only once, to the best of his recollection, before they finally retired to deliberate, and offered some evidence, which Mr. Lydig refused to hear, telling him that he did not think that they, the appraisers, were bound to receive any, and that after they, the said appraisers, had retired to deliberate and confer, the said Van Wyck did not come into the room, nor appear at all before them, nor any other person, than the aforesaid Abraham I. Underhill.

To the eighteenth interrogatory—The deponent saith, that at the time of his acting as an appraiser, as abovementioned, he viewed and examined the mills mentioned and inquired about in said interrogatory; and that, from this circumstance, and, also, from the circumstance of his having lived for twenty-two years near the premises, during which time he has been in the constant habit of seeing the said mills, he is particularly well acquainted with both of them, and is enabled to form a pretty correct estimate of their comparative value, and that, in his opinion, the said mill, first mentioned and described in said interrogatory, (Van Cortlandt and Hollman's) is more valuable than the said other mill, formerly in the occupation of the respondents; that he has never measured either of said mills, but that the one belonging to General Van Cortlandt is a good deal higher, though, perhaps, not wider than the other, and is in much better order, and is sounder in every part, in the deponent's opinion, being a newer mill by several years, and constructed on a better plan, particularly as to its machinery, and capable of doing business to better advantage; and the deponent saith, that if the choice were proposed to him, he would rather have the said mill of General Van Cortlandt, than two such

mills as the respondent's, without, however, taking into account the dam and raceway belonging to the latter.

To the twenty-third interrogatory—The deponent saith, that he is well acquainted with the premises, mentioned and inquired of in said interrogatory; and that, previous to the time when the respondents took their lease, and erected their mill, as before mentioned, in said place, there were two grist mills, namely, one being a small one, which used to grind for the country, and which the deponent very well remembers, and the other, (which he also saw, but while it was in ruins,) he was informed, used to be employed by Lieutenant-Governor Van Cortlandt, in manufacturing flour. The deponent also remembers, that there was a raceway, at the place aforesaid, for the said mills; that the small mill aforesaid, for country work, was in operation at the time the respondents began to erect their aforesaid mill, or mills, but the other was, about that time, taken down, and the small one was also shortly afterwards taken down; previous to which, however, the said small mill was used by the respondents for grinding, but for what length of time he does not remember; he thinks, however, not long after they got their new mills in operation.

To the last interrogatory—The deponent saith, that, at the time they, the said appraisers, were deliberating on the subject of the appraisement, the aforesaid David Lydig observed to the deponent, and Mr. Mott, that the respondents were enterprising men; that they had taken the place in a state of nature, had laid out a great deal of money, and had made it a valuable property; that, therefore, the Van Cortlandts ought either to renew their lease, or pay them what they had laid out; and it appeared to the deponent, that the said David Lydig, in making said valuation, as above mentioned, was, in some measure, guided by this idea and view of the case, and which idea the deponent considers as erroneous and improper.

(This witness was not cross examined.)

Theodorus C. Van Wyck testifies as follows, viz.

Testimony of Theod. C Van Wyck.

To the fourth interrogatory—The deponent saith, that when Samuel Mott and Nathan Anderson, on the first and third days of May, 1813, viewed and examined the mills and appurtenances, mentioned and referred to in said interrogatory, he, at the request of the late Pierre Van Cortlandt, deceased, to attend to the business of the appraisal thereof, accompanied them, and that this was previous to the appointment of David Lydig as a third appraiser; that the said Mott and Anderson, on the occasion aforesaid, went into the grist mill in question, built, as he understood and believes, by the respondents and their co-lessees, but did not make a thorough examination thereof; that, on the 3d of May aforesaid, they went into, and viewed, and examined, in a slight and cursory manner, the grist mill erected by Philip Van Cortlandt and Jesse Field, and standing, in part, upon the said leased premises, and then owned by Philip Van Cortlandt, and John F. Hollman. The deponent saith, that it did not appear to him that they took much pains to ascertain the particular condition of the mills and premises, examined by them as aforesaid, and the deponent does not think that they examined the said mills and appurtenances, nor either of them, in a manner sufficiently particular to enable them to form a just and correct estimate of their value, nor of the value of either of them, and the deponent was not satisfied with their manner of viewing and examining the same.

To the seventh interrogatory—The deponent saith, that on the 8th of July, in the year aforesaid, he, as agent to Pierre Van Cortlandt, deceased, accompanied the aforesaid Mott and Anderson, together with David Lydig, the other appraiser, in viewing and examining the mills and premises in question, and that, in his opinion, the said appraisers did not examine the mills and appurtenances in a manner sufficiently particular to enable them to form a just and correct estimate of their value, nor of the value of

either of them; and he, the deponent, was not satisfied with their manner of viewing and examining the same, as it did not appear to him that they took sufficient pains to astertain the real state and condition in which the said mills and appurtenances were, nor either of them; nor did they examine either of the other buildings, as the deponent saw, except the dwelling house then occupied by Abraham I. Underhill.

To the tenth interrogatory—The deponent saith, that, on the 8th of July aforesaid, after the appraisers had their view and examination, in manner aforesaid, and having eaten dinner, had retired to a private room, up stairs, in the house aforesaid, occupied by Underhill, they sent word to the respondents, the appellant Philip Van Cortlandt, and the deponent, telling them, that, if they had any thing to communicate, they were ready to hear them; whereupon the respondents, the appellant Philip Van Cortlandt, and the deponent, as the agent of Pierre Van Cortlandt, now deceased, went up into the said room; that the deponent, having heard David Lydig, while viewing the premises, remark, that the raceway was an immense thing, and the aforesaid Samuel Mott having, at the same time, said to the deponent, "I suppose you would not be without the raceway for ten thousand dollars?" the deponent availed himself of the opportunity aforesaid, then and there into the said room, as the agent of Pierre Van Cortlandt, deceased, and in the presence of the respondents, to mention to the said appraisers, that he could bring witnesses to prove, that the said raceway in question would not cost, at the then present rate of wages, more than one thousand dollars; to which the said David Lydig replied, that he could not wait to receive such evidence; that the deponent then offered to go into the evidence thereof immediately; to which the said David Lydig made no answer, and appeared to be displeased; nor did Mott or Anderson make any reply thereto; and the deponent considered it

as amounting to a refusal to receive said evidence; that the deponent was prepared to make a number of observations to the appraisers on the subject that they were then about to deliberate upon, but that he was so surprised at the conduct of Mr. Lydig, in manner above mentioned, that he did not make all the remarks he had intended, and he retired with the rest of the parties aforesaid, a short time afterwards; that shortly afterwards, the deponent recollecting, that the aforesaid Pierre Van Cortlandt, deceased, had instructed him to declare to the appraisers, that he would have nothing to do with the patent rights, or licenses, the deponent thought it his duty, acting as his agent, to communicate the same to the said appraisers; whereupon he went to the door of said room, and asked permission to come in, telling them, that he had something to communicate, and thereupon, before such communication was made to them by the deponent, they sent for, or Samuel Mott called, Joshua Underhill, one of the respondents, to come and be present at the time the deponent should make the same; that, when he came, the deponent mentioned to them the determination aforesaid, of the said Pierre Van Cortlandt, relative to the patent rights; to which the said Underhill replied, that he had bought the patent rights for six run of stones, with the privilege of using seven; that, after some little conversation, he and the said Underhill left the room; after which the deponent did not go, nor attempt to go into said room, till after the said appraisers had made up or signed their report.

To the eleventh interrogatory—The deponent saith, that he viewed and examined the mills and machinery in question, together with the dam and raceway, before the 1st of May, 1813, and that he has viewed the same since that period; that, between the first of May, and the latter part of November, 1813, he took various views of the mills and premises before mentioned, and that he did the same for

the purpose of enabling himself to form an opinion of the value thereof, respectively ; and he took pains to ascertain what the said mill, built by the respondents, and the dam and raceway, were worth, and the deponent considered the same, together with the saw-mill, to be worth, on the 8th of July, 1813, about six thousand five hundred dollars ; and he is still of the same opinion, as to their value at that time.

To the fourteenth interrogatory—The deponent saith, that he has known the mills and premises in question for many years, and that he was in the habit of seeing them, at various times, for a number of years, and that as he has already mentioned, he examined said mills, and the machinery appertaining thereto, and the dam and raceway in question, at various times, between the first of May and the latter part of November, and that he also paid particular attention to the condition and state of repair thereof, at the two several times when he accompanied the appraisers, as he has before mentioned ; and that, on the 22d of November, in said year, he also took a particular notice thereof, and that the only material difference, in the condition and state of repair thereof, between the 8th day of July and the said 22d day of November, consisted in the natural wear and tear thereof, and in the destruction of one of the main cog-wheels, which went to pieces, as he understood and believes, while in ordinary use ; and the deponent does not know whether or not the mills or machinery, and the dam and raceway, have decreased in value, since the first of May, 1813, to this present time, as inquired of in said interrogatory.

To the last interrogatory—The deponent saith, that, sometime after the 8th of July, 1813, and subsequent to the appraisement, the said David Lydig, upon the deponent's showing him a copy of the report of the appraisers, and asking him if he had appraised the patent rights, for seven run of stones for the mill of the respondents, he answered

in the affirmative ; and the deponent further saith, that the only inventory, to his knowledge or belief, taken by the appraisers, of the property in question, previous to their making their report, consisted merely of a memorandum respecting the bolts, and he did not see them take a memorandum or inventory of any thing else ; and the deponent further saith, that when he appeared before the said appraisers, in the manner he has before mentioned, and, as he believes, previous to his offering to go into evidence, as before mentioned, he stated in the presence of the respondents, that it was the request of the said Pierre Van Cortlandt, deceased, that each thing should be appraised separately, to which Mr. Lydig replied, that he did not know that they were bound to appraise them in that manner ; and the deponent saith, that he, neither as the agent of the said Pierre Van Cortlandt, deceased, nor otherwise, ever consented that the said David Lydig should be appointed one of the appraisers, nor as an umpire ; and the deponent further saith, that the late Pierre Van Cortlandt, deceased, was, on the first of May, 1813, upwards of ninety years of age, as the deponent understood and believes, and that he was not able to attend the appraisers in viewing and examining the mills, &c. neither on the first, nor third of May, 1813, nor eighth of July, in the same year, nor was the said Pierre Van Cortlandt present with the said appraisers, in any of their proceedings relative thereto ; and the deponent further saith, that to the best of his knowledge, information, and belief, neither the said David Lydig, nor the said Samuel Mott, has been into either of the aforesaid mills since the eighth of July, 1813 ; and he further saith, that, about the time of the expiration of the aforesaid lease to the respondents, he heard the aforesaid Pierre Van Cortlandt say, with respect to patent licenses, that the lessees aforesaid had no right to encumber the premises with them subsequent to the time of said lease.

To the fourth additional direct interrogatory—The deponent saith, that he has been informed by different persons who said that they had worked for the respondents, at the time of the building of the grist-mill, dam, and raceway in question, that the stones, composing the foundations of said grist-mill, were taken from off the demised premises, and were easily procured, and that this was the case, also, with respect to the dam and raceway, and that all the gravel for the said dam and raceway was procured on said premises. The deponent having intimated to the respondent, Abraham I. Underhill, that the stones composing the foundation of said grist-mill were taken from off said premises, namely, from the opposite side of the Croton riven, within the bounds of the demised premises, he acknowledged that it was so.

To the fifth additional direct interrogatory—The deponent saith, that, as to the dam and race in question, the latter, for the distance of about nine rods, commencing from the saw-mill, consists of timber and plank, and the remainder of it, called the gravel race, consists of stones and gravel, and some wood, that is to say, for about nineteen rods it is dug in the side of the hill, and is composed of gravel and stones, and considerably obstructed by the roots of willow trees for some distance ; from thence, for about thirteen rods, it consists of gravel and stones at the bottom and on one side, and on the other of wood and plank and stones ; that the dam then commences, consisting of stones and some wood, and extends about fifty-two feet to a small island, or rather to a large rock, forming part of said island, that it then extends along said island for about fifteen rods, the said island forming the same, except in places where it was necessary to raise the same with wood and stone ; that the dam then continues from the upper end of said island, to some distance up the river, and then turns and runs to the opposite shore, making a length, from the upper end of the island, as aforesaid, of about twenty-two rods, to the best of

his remembrance and belief; that the last mentioned part of said dam consists of stones and wood, plank, and some gravel, and also of some rocks which appear always to have lain there in a state of nature; that the timber in said dam is supported by, or butted against, said rocks in certain places, and that the said last mentioned part of said dam, is the height of two logs, placed sideways upon one another.

CROSS EXAMINED.

To the first, second, third, and fourth cross interrogatories—The deponent saith, that he is related, as he has been informed, and believes, and has no doubt, to Philip and Pierre Van Cortlandt, by birth, they being his uncles, Catharine Van Wyck, the deponent's mother, Gerard G. Beekman, his uncle, by having married Cornelia Van Cortlandt, the deponent's aunt; and that he is in a similar manner related to Philip S. Van Rensselaer, and his wife; and the deponent further saith, that he has not, nor has he ever had any legal or equitable interest in the event of this suit.

To the fifth cross interrogatory—The deponent has never been employed in building any mill or mills, or in repairing them.

To the sixth cross interrogatory—The deponent saith, that, from the circumstance of his having viewed and examined mills, and from inquiries he has made from time to time, respecting the cost thereof, from persons having experience in the business, he has acquired a very considerable degree of knowledge of the cost of building mills for manufacturing purposes, as inquired about in said interrogatory, but that he never paid any bills of expense, relative to such building of mills.

To the seventh cross interrogatory—The deponent saith, that he has viewed dams and raceways, at different times and at different places, but that he only knows the cost of building them, from the information of those who had them built, or had worked at that business.

To the eighth cross interrogatory—The deponent saith, that, he believes, he knows the length of the dam in question, and that he has a general knowledge of the width and depth of the race and flue, from having been present and assisting in measuring the same; that, as to the dam, he was present when a part of it was measured, namely, from the head of the raceway to the upper end of the island; that the other part thereof the deponent caused to be measured by the chain, though he was not present at the time; and that, on another occasion, a compass and chain were made use of in taking the bearings in the usual way, and the deponent was present at the time, and assisted. And the deponent further saith, that there are a number of rocks and large stones in the said dam, forming a part thereof, and which appear never to have been removed from their natural situation, and he does not know nor believe, that there are any stones composing said dam, but what were found on the spot, or close by.

To the ninth cross interrogatory—The deponent saith, that he never was employed to work in the mills, previous to the first of May, 1813; but that he understood, that, some considerable time before the expiration of the lease, the respondents had manufactured as much as one hundred barrels of flour in twenty-four hours; but that this was at a particular time, when, it was said, business was very good; the deponent knows the same, however, only from information.

To the tenth cross interrogatory—The deponent saith, that, as he has before mentioned, in his answer to the direct interrogatory, he viewed the mills, dam and raceway in question, as the agent of Pierre Van Cortlandt, deceased, and that he did view and examine the same, on the 22d of November, 1813, as the agent aforesaid, while attending the persons who were employed to take a view of said premises; he does not know, however, that the respondents were previously apprised of the said view and exa-

mination, had and made on the said 22d of November, 1813; and the deponent was not instructed to give them any such previous notice; and he well remembers that Joshua Underhill, some time previous, declared, in the presence of the deponent, that he would not leave the matters to men again.

To the first additional cross interrogatory—The deponent saith, that, previous to the expiration of the respondents' lease, Pierre Van Cortlandt, deceased, promised the deponent to give him the refusal of a lease of the mill in question, when the respondents' lease should be expired, but that no writing passed between them on that subject, nor was any such lease ever made out. After the respondents quit possession, the deponent, living in the family of the said Pierre Van Cortlandt, and being his grandson, and occasionally transacting his business, without any charges, the said Pierre, upon being asked by the deponent, if he, the deponent, might employ the grist mill and appurtenances and water, to propel the same, replied, by asking the deponent, how much would be the interest of eighteen thousand dollars? And, upon the deponent's telling him, twelve hundred and sixty, he asked the deponent, if he thought he would be able to make or pay as much, (he does not recollect which;) to which the deponent answered, that he thought he would be able; that the said Pierre, shortly afterwards, gave the deponent the key of the mill, and told him to do the best he could, and a few days afterwards, gave the deponent permission to put Walter Fowler into the dwelling-house; the deponent, thereupon, took possession of said dwelling-house, mill and water, soon afterwards, by leasing the same to said Walter Fowler, until the first day of April, 1814. The deponent never became bound, nor assumed to pay, as a consideration, for the use of said dwelling-house, mill and water, nor any part of said property, the appraised value thereof, nor any part thereof, nor the sum to be recovered by the

respondents in this suit, nor any part thereof; and the deponent never stood in any other relation to the said Pierre Van Cortlandt, in regard to said house, mill and water, than as tenant at will, and liable to account to him for the use of the same, in case he should require it; but he never demanded of the deponent rent therefor, though the deponent presumes he would have required of him some reasonable return for the use of said premises, after allowing the deponent a reasonable compensation for his services in procuring business for said mill.

To the second additional cross interrogatory—The deponent saith, that, about the time when the above mentioned lease to Walter Fowler expired, the deponent leased the above mentioned premises to him again, for one year, from the first of April, 1814, and the above mentioned Pierre Van Cortlandt, having died before the first of April, 1815, Catharine Van Wyck, one of the devisees of said Pierre Van Cortlandt, directed the deponent, in March, 1815, to keep possession of said mill; and, in March, 1816, she executed to the deponent an instrument in writing, authorizing him, as far as her right extended, to keep possession thereof till April, 1817; that the terms of said first lease to Walter Fowler, for the dwelling-house, mill and water, to the best of the deponent's remembrance and belief, were, viz. The deponent was to be at the expense of oil, tallow, beeswax, brands and picks, necessary for said mill, and the repairs necessary to keep said mill in running repair, new bolts and bolting-cloths excepted, and of the hire of a scow and a small row-boat, for the use of the mill, and suffer said Walter to get some fire-wood for the use of the mill. The said Walter, on his part, in consideration of the premises, was to pay five cents per bushel for all grain ground or manufactured in the said mill, one cent per bushel for what grain passed through the smut-machine, three shillings per bushel for old flour that should be re-manufactured, and an amount equal to one half of

what he should get, above seven cents a bushel, for grinding and manufacturing grain; he was, also, to keep the accounts of the mill, and purchase barrels for, and on account of those who should have grinding done at the mill, and use his best endeavours to procure business for the said mill. In the spring of 1814, the said Walter Fowler rendered the deponent an account of the work done in the said mill, and, after deducting the amount of the expenses incurred, which, as above set forth, were to be borne by the deponent, the balance, received by the deponent, was only, to the best of the deponent's remembrance and belief, about three hundred dollars; and that the terms of the aforesaid second lease to said Fowler, were, to the best of the deponent's remembrance and belief, similar to the lease last mentioned, with this addition, namely, the said Fowler was to have the use of some land, and that the deponent should be benefited by the penalty arising from the non-performance of contracts, to supply said mill with grain, should there be any such contract made with the said Fowler, on which such penalty should be incurred; that by the account rendered to the deponent by said Walter Fowler, in relation to said mill, from the first of April, 1814, to the first of April, 1815, the expenses, as above mentioned and set forth, to be borne by the deponent, nearly equalled the rent which the said Fowler was to pay for the use of said mill and premises, in manner above mentioned; and the deponent further saith, that the whole amount of rent for the mill, dwelling-house, water, &c. as leased to said Walter, in manner above mentioned, from the time he first took possession thereof, in September, 1813, till the first of April, 1815, did not exceed, to the best of his remembrance and belief, seven hundred dollars, from which amount the expenses to be borne by the deponent, as above mentioned, were to be deducted; and, lastly, the deponent saith, that said Fowler has not rendered to him a particular account

of the business and expenses of said mill done and incurred since the first of April, 1815.

To the third additional cross interrogatory—The deponent saith, that he never did, directly or indirectly, give nor hold forth any consideration whatever to the said Walter and William Fowler, nor either of them, to induce them, or either of them, to become witnesses in this suit, nor to induce them, or either of them, to establish any fact whatever by their testimony, or the testimony of either of them, in this suit; nor does he know that any person whatever has given, or held forth, any consideration whatever, to said Walter and William, nor either of them, to induce them, or either of them, to become witnesses in this suit, nor to induce them, or either of them, to establish any fact whatever by their testimony, or the testimony of either of them, in this suit.

To the fourth additional cross interrogatory—The deponent saith, that after the 8th of July, 1813, and before Abraham I. Underhill quit the said demised premises, the deponent learning, from his application to the said Pierre Van Cortlandt, deceased, that he was willing to sell to the deponent, absolutely, the mill seat whereon the grist mill aforesaid, built by the Underhills, stood, together with the mill and water sufficient to propel the same, for eighteen thousand dollars, the deponent, at his own instance, and by his own authority, and not at the request of any person whatever, called on Joshua Underhill, and inquired of him, whether the respondents would take the deponent's bond for eighteen thousand dollars, to be secured by a mortgage to be executed by the said Pierre Van Cortlandt, on said mill seat, and mill and water to propel the same, the interest to be paid annually, and the principal by instalments, the mill to be insured for a few thousand dollars, and the policy to be assigned as a collateral security; that the said Underhill answered, that he would consult his brother, Abraham I. Underhill, on the subject, and would

give the deponent an answer. The deponent, shortly afterwards, understood that they had declined entering into any such arrangement; and the deponent saith, that his reason for making said inquiry of the respondents was, that he contemplated that, if the respondents would take the deponent's bond, secured in manner aforesaid, as so much money, on account of said Pierre, and if the said Pierre, in order to make his peace with the respondents, would agree that the deponent should give his bond as aforesaid, to the respondents, on his account, and should, thereupon, and for no other nor further consideration than the deponent's giving such bond, absolutely convey to the deponent a good and indisputable title, in fee simple, for the said mill seat and mill, and full supply of water therefor, to be taken out of the adjoining race, without the deponent's being obligated to keep the dam and race in repair; that then it might possibly answer for the deponent to make said purchase. The deponent saith, that the reason for proposing that the mortgage, before mentioned, should be executed by the said Pierre Van Cortlandt, before the conveyance of said premises to the deponent, was, that the deponent did not conceive himself in a situation that would enable him to give a mortgage free from the right of dower. And the deponent saith, that no writings passed between him and the said Pierre Van Cortlandt, on the subject above mentioned, nor between the deponent and the respondents, nor either of them. And the deponent further saith, that when he mentioned to his mother, Catharine Van Wyck, the proposal aforesaid, to purchase said mill, &c. she disapproved thereof totally, and the deponent himself had, afterwards, reason to be glad that he had not made said purchase, on account of the small income arising from said mill. And, lastly, the deponent saith, that as to the expression mentioned, and inquired about, in said interrogatory, as having been made by him, he thinks it not improbable he may

have made some observations of that kind, meaning, however, nothing more than that if the respondents had agreed to such an arrangement, proposed to them by the deponent, in manner aforesaid, and had taken such bond and mortgage, that then they might have got their money by foreclosing said mortgage, and, in case of a deficiency, would have held the deponent on his bond.

Thomas Burling testifies as follows, viz. Testimony of Thomas Burling.

To the twentieth interrogatory—The deponent saith, that, as to the paper writing marked with the letter A, the same is a true copy of an account furnished to the deponent and William Burling, his brother, by Joshua Underhill & Co. The said account was furnished, as aforesaid, under the circumstances and on the occasions as follow, to wit: When the said Joshua Underhill & Co. took their lease of the Van Cortlandts, as aforesaid, the deponent and his aforesaid brother, took an interest in the business of the mills, and made an agreement with them, by which he and his said brother agreed to advance money for carrying on the concern, and the said Joshua Underhill & Co. were to have a commission on buying the wheat; that advances of money were accordingly made, till, at length, the deponent, not finding it convenient to advance any more, he and his said brother came to a settlement of accounts with the said Joshua Underhill and Co. on which occasion they, the said Underhills, furnished the account in question, of which the aforesaid paper-writing, marked with the letter A, is a true copy. And the deponent saith, that the original of said accounts are in the possession of his aforesaid brother, William Burling, and that the same are in the hand-writing of the said Joshua Underhill & Co.

William Burling testifies as follows, viz. Testimony of William Burling.

To the twentieth interrogatory—The deponent saith,

that, as to the paper-writing marked with the letter A, he has seen the same paper, but he does not know whether or not it is a true and correct copy from the original accounts now in the deponent's possession, and which he now produces and deposits with the examiner, the same being marked, respectively, O No. 1. O No. 2. and O No 3. The deponent and his brother, Thomas Burling, having been concerned with the respondents in the milling business, they afterwards came to a settlement with the respondents, on which occasion they furnished the deponent and his said brother with the aforesaid original accounts, marked and numbered as aforesaid; and lastly, the deponent saith, that he is not certain in whose hand-writing the said originals are, but it appears to him that they are either in the hand-writing of one or both of the respondents, or of some person in their employ. He perfectly recollects, however, that the said originals were handed, on the occasion aforesaid, to the deponent and brother by the respondents.

Testimony of Robert M'Queen.

Robert M'Queen testifies as follows, viz.

To the first interrogatory—The deponent is a millwright and resides in the city of New-York, and has been employed in building and superintending the building of mills for twenty years past.

To the eleventh interrogatory—The deponent saith, that in the month of November, of the year 1813, he, together with Justus Thorn and Scudder Waring, at the request of the Van Cortlandts, took a view of, and examined the mills, dam, and raceway, particularly mentioned and inquired of in said interrogatory; and he understood, at the time, that the same was for the purpose of enabling the deponent and the others to form a just and true estimate of the value of the said mills and machinery, dam, and raceway; that he, together with the others, took a minute and particular view of the premises, and they then proceeded to make a valuation of the said mills and appurtenances; that, in making

their said estimate, they valued the dam, the raceway, mills, and machinery, all separately, but he does not recollect what such separate estimate was; and they then computed the whole value of the aforesaid premises at six thousand five hundred dollars; he thinks there was an old saw-mill, which was worth a very trifling sum, included in the estimate, and he thinks, though he is not certain, that the dwelling-house was also included.

To the fifteenth interrogatory—The deponent saith, that as he has before mentioned, he viewed the mills and premises in question, in the manner before related, and that, in his opinion, the cost of building, at the place where the said mills are now standing, entire new mills of the same dimensions, with the same number of run of stones, and with all the requsite machinery, would not exceed between sixteen and seventeen thousand dollars, supposing the place to be in a state of nature, and a new foundation, dam, and raceway to be made at the same time. The deponent's said opinion is founded on the estimate which he made as aforesaid, of the said mills, dam, and raceway, in the manner before stated, and also, on the experience he has had in the business of building mills and their appurtenances; and the deponent saith, that in making their examination as aforesaid, they were accompanied by a stone mason, who was able to compute the cost of the stone-work.

To the sixteenth interrogatory—The deponent saith, that, as he has already mentioned, he viewed and examined the dam and raceway in question, in the manner before related; that he did not measure the dam exactly, on account of the height of the water, though by pacing along the side thereof, a part of the way, they formed some estimate of its dimensions, but that they were enabled to measure the raceway more accurately: the deponent is of opinion, that supposing the places where the said dam and raceway now are, were in a state of nature, it would cost about three thousand five hundred dollars to make and construct a dam

and raceway similar to those in question: the deponent has had some experience in works of that kind, which enables him to form an estimate on the subject, in the manner above stated.

CROSS EXAMINED.

To the fifth cross interrogatory—The deponent saith, that he has been engaged in the mill-wright business for about twenty years in this country; previous to which he worked, as such, in Scotland and in England for about ten years; that the first work of the kind which he performed in this country, was making the machinery for Caldwell's mills in Albany, and the works, or running gear for the mills of Stephen Van Rensselaer, in said place; that he has also made the machinery for the mills of Thomas L. Whitbeck, a few miles above Albany; of W. & I. Minturn, near Troy; Dominick Lynch, at Rome, in this state; Stephen N. Bayard, at Seneca falls, and a great number of others, in different parts of this state, which the deponent might enumerate if necessary; but, that since the establishment of his furnace in this city, (New-York,) he has not attended, in person, to the building of mills, though he has sent persons, in his employ, to attend to such business: some of the mills aforesaid, were for manufacturing purposes, and those of Mr. Lynch contained four run of stones.

To the sixth cross interrogatory—The deponent saith, that the mills of Minturn, before-mentioned, were built by the deponent: they contained four run of stones, and were what are called merchant-mills. The deponent paid bills for the materials used in building said mills, excepting the bolting-cloths, and he has paid in like manner, similar bills in other cases, where he has been employed in building mills.

To the seventh cross interrogatory—The deponent saith, that he is acquainted with the expense of building dams and raceways, from the circumstance of seeing the raceway made for Lynch's mills, at the time the de-

ponent made the machinery for the mills, and he had opportunities of knowing the labour and expense thereof; and that this was, also, the case at Whitbeck's mills and Minturn's before mentioned; and the deponent is concerned in a mill at Waterford, the dam of which was rebuilt last summer, and the deponent is well acquainted with it, and knows the expense thereof, from having paid his proportion thereof.

To the eighth cross interrogatory—The deponent saith, that he, and the other persons with him, as aforesaid, measured the width and depth of the raceway in question, and that they measured the length of it by pacing the same, and that, as he has before mentioned, they measured off the dam in question, in the manner he has before mentioned, but not accurately, on account of the water overflowing a part thereof, and such parts as they did measure corresponded with the statement made by Mr. Van Cortlandt; that there are a number of large stones in said dam, but it appeared to the deponent that many of them had not been removed from their natural situation.

To the tenth cross interrogatory—The deponent saith, that it was by the request of the Messrs. Van Cortlandts, that he viewed the premises in question, in the manner before related, though his impression at the time was, that the respondents were apprised of the same, but he understood shortly afterwards, they were unacquainted therewith.

Justus Thorn testifies as follows, viz.

Testimony of Justus Thorn.

To the first interrogatory—The deponent is a millwright, and resides at Peekskill, and, for twenty-eight years, has been employed in working at the millwright business, and in building and superintending the building of mills.

To the eleventh interrogatory—The deponent saith, that he is acquainted with the mills and premises mentioned and referred to in said interrogatory; and that, in the

month of November, 1813, he, together with Robert M'Queen, and Scudder Waring, at the request of General Van Cortlandt, viewed and examined the said mills, and the machinery belonging thereto, together with the dam and raceway, and that the same was done for the purpose of enabling the deponent and the other persons, as aforesaid, to form a just and accurate estimate of the value of the said mills and machinery, dam, and raceway. In the first place they examined the dam and raceway, and then proceeded to the mills, and took a particular view of the works and machinery, and of the foundation of the mill and of the building itself, and that they had with them a mill-stone maker, and a mason, in order to examine the mill stones and foundation; and that, after completing the said examination, they proceeded to make an estimate of the value of said mills and machinery, dam, and raceway; and the deponent, together with the said M'Queen and Waring, concurred in opinion, that the just value of the same, according to the best of their judgment, from the view aforesaid, was six thousand five hundred dollars, not including, however, the dwelling-house.

To the fifteenth interrogatory—The deponent saith, that, in his answer to the eleventh interrogatory, he has already mentioned the view and examination of the mills and premises in question, which he made, together with Mr. M'Queen and Waring; and that, on that occasion, they ascertained the dimensions of said mills, and the number of run of stones contained therein, and, in the opinion of the deponent, the cost of building and erecting, at the place aforesaid, where the said mills are standing, new mills of the same size and dimensions, with the same number of run of stones, and requisite machinery, would be between fifteen and sixteen thousand dollars; but it would cost something less than that, in case the old foundation should be used in erecting such new mills. The deponent's said opinion is founded upon the estimate and calculations made by him, at the time of viewing the pre-

mises, in the manner before-mentioned. The deponent, and the aforesaid Robert M'Queen, conversed together, at the time, relative to the expense of building an entire new mill, in the manner inquired about in said interrogatory, after having made the examination aforesaid, and calculated in their own minds the particular costs of such an undertaking, by means of the experience they possessed on the subject, and they concurred in opinion, that such new mills might be erected, as aforesaid, for the sum before mentioned. The deponent would be willing to undertake the business, at this time, as he would have done at the time aforesaid, for the sum before mentioned.

To the eighteenth interrogatory—The deponent saith, that when he, together with M'Queen and Waring, viewed the mills last mentioned, they, at the same time, went into the mill occupied by Van Cortlandt and Hollman, and that their object was to ascertain its dimensions, and to see the condition and state of repair of said mill and machinery, in order that they might form a comparison between the said mill and the one before mentioned, occupied by the respondents. The deponent is of opinion, that the building, or mill house, of the said Van Cortlandt and Hollman's mill, is worth nearly as much again as that of the other mill, and that, as to the machinery of Van Cortlandt and Hollman's mill, what is called the small machinery, is a great deal better, and more valuable, than that of the other mill; and that the large machinery is, also, better than that of the other mill, though the difference is not so great as between the small machinery. The said mill of Van Cortlandt is larger than the other mill, and contains more room, having more floors, and being capable of more storage. He remembers when the said mill was building, and, to the best of his recollection, it is about eighteen years ago.

CROSS EXAMINED.

To the fifth cross interrogatory—The deponent saith, that he began to learn the business of a mill-wright twenty-eight years ago, since which time he has been employed in building a great number of mills, in different places, as master workman in said business, among which are the mills at Kingsbridge, about fourteen miles from the city of New-York, which contain eight run of stones, and are employed in manufacturing flour. The deponent, however, did not begin the building of the said mills, but he undertook the completion of the same after two run of stones were put up, or, rather, he and his partner undertook the same, and worked together. He, afterwards, was employed by George Philips, at Poughkeepsie, and built an additional story to his mills, and put up an additional set of machinery; that he was also employed by Governor Lewis to build a flour mill, a plaister mill, a fulling mill, and saw mill, in Dutchess county; that he also put up three run of stones for Henry B. Livingston, at Rhinebeck; and he built two new mills at the Nine-Partners, and, also, a mill of two run of stones for George D. Wickham, on the Delaware river, or rather, what is called the ten mile river. The deponent could, if necessary, enumerate many other mills which he has erected in different places; and that most of the mills built by him, as aforesaid, contained machinery for manufacturing purposes.

To the sixth cross interrogatory—The deponent saith, that he has a knowledge of the cost of building mills for manufacturing purposes, and has acquired the same in the manner, and by the means mentioned in his answer to the last preceding interrogatory. The deponent has paid bills of the expense, relating to the mill-wright business, and has had bills paid to him for the work performed by him, as above mentioned, but he has never built a mill for himself, nor has he ever kept a particular account of the entire expense of erecting a new mill.

To the seventh cross interrogatory—The deponent saith, that he has built a great many dams and raceways, connected with the mills built by him, as before mentioned, but has never paid any of the bills of expense, except for the labour. The deponent, however, from his general knowledge on the subject, thinks he is able to form a pretty good opinion of the cost of building the same.

To the eighth cross interrogatory—The deponent saith, that he knows the dimensions of the raceway and flue, as inquired of in the said interrogatory; that the raceway is thirty-two rods in length, about twelve feet in width, on an average; at the surface, about three feet, eight inches in depth, though, in one or two places, considerably deeper. The dam he was not able to measure, on account of the water running over it. In viewing the said dam it did not appear to the deponent, that there were any large stones therein that had ever been removed from their natural place.

Testimony of Scudder Waring.

Scudder Waring testifies as follows, viz.

To the 1st interrogatory—The deponent is a mill-wright by trade, and resides in Cortlandt-town, in the county of West-Chester. He has been in the habit, for many years, of working at mills, as a mill-wright, but he never superintended the building of mills but once, which were mills belonging to the Messrs. Doughtys, in Dutchess county.

To the 11th interrogatory—The deponent saith, that he is well acquainted with the mills mentioned and described in said interrogatory, and that he worked in the same nearly twenty years, as a journeyman mill-wright, but that he never made such a particular view and examination thereof as is inquired about in said interrogatory, till after the first of May, 1813, and that it was on the twenty-second day of November, 1813, that he made a particular examination thereof, for the purpose of enabling him to form a just and accurate estimate of the value of said

mills and machinery, dam, and raceway, and that Robert M'Queen and Justus Thorn were associated with him in making the said view and examination, in addition to whom there was a stone mason for the purpose of examining the foundation, and a mill-stone-maker, named Egerton, to the best of his recollection, for the purpose of examining the mill-stones of said mill. After taking a complete view of the said premises, and examining the different parts thereof, the deponent and the other persons above mentioned, concurred in estimating the said mills and machinery, dam, raceway, and premises, exclusive of the dwelling house, as being worth six thousand, five hundred dollars, and no more. In taking the view aforesaid, they made a thorough examination of all the said premises, and took pains to inspect the various parts thereof, and the condition they were in, in order to form a correct estimate of their then present value.

To the fifteenth interrogatory—The deponent saith, that, as he has above mentioned, he viewed the mills and premises in question, and that the dimensions of the mill, and the number of the run of stones were, on that occasion, taken, and ascertained, as inquired about in said interrogatory. The deponent is of opinion, that an entire new mill of the same dimensions, and with the same number of run of stones, and with all the requisite machinery, might be erected, at the same place, for about twelve thousand dollars, setting the same, however, on the same foundation, and the deponent formed said opinion upon the estimate and calculation made as above mentioned.

To the eighteenth interrogatory—The deponent saith, that he is well acquainted with the mill occupied by Philip Van Cortlandt and John F. Hollman. He has compared the size and dimensions thereof, and the condition and state of its repair, with the size of the other mill, occupied by the respondents, and, in his opinion, the first

mentioned mill is worth as much again as the other. The said first mentioned mill is forty-five feet square, and has five and a half floors, and the addition, which was afterwards joined to it, is fifteen feet by forty-five, and has two floors; that the other mill of the respondents is sixty feet by thirty feet, and has four floors, and the addition to it is sixty feet by twenty-one, and has three floors, that it has also six run of stones, which is one more than the first mentioned mill, but which said first mentioned mill is, nevertheless, capable of more storage, and can perform, as he should suppose, nearly as much work, though he is not certain which mill will do the most work. The said Hollman's mill is in much better repair than the other, the building being sound and strong, and the works and machinery are also better. The deponent remembers when the said Hollman's mill was built, and, to the best of his recollection, it is twenty years ago.

To the last interrogatory—The deponent saith, that the dam mentioned in the interrogatories, and also the raceway and flue, were a good deal out of repair at the time the respondents quit possession, and much of the timber composing the same was rotten, so that considerable repairs were necessary.

CROSS EXAMINED.

To the fifth cross interrogatory—The deponent saith, that he has already mentioned the experience he has had in the business of a millwright, and in building mills; and that the mill, of which he superintended the building, for the Doughtys, contained only two run of stones, and was employed in country business, but it contained a superfine bolt, and elevators.

To the sixth cross interrogatory—The deponent saith, that, although he has never superintended the building of what are called merchant's mills, yet he has worked in such as a millwright, and he did so in the mills of the re-

spondents, and of Hollman and Van Cortlandt, but he does not profess to have much knowledge of the costs of building mills on a large scale, though he thinks himself capable of forming an estimate of them, from the knowledge he possesses of the costs and expense of other mills, they being, partly, much the same in point of workmanship, though on a different scale.

To the seventh cross interrogatory—The deponent saith, that he has never built a dam similar to the one in question in this cause, but that he has built dams that were more expensive, and more difficult to build, from which he has acquired some experience respecting the costs of such work; and that he has paid bills of the expense of such dams, viz. one for the Furnace creek, in Cortlandt-town; one for Joseph Tomkins, on a stream running into the Croton; and two for the Doughtys, in Dutchess county.

To the eighth cross interrogatory—The deponent saith, that he knows the dimensions of the dam, raceway and flue, as inquired of in said interrogatory, and that he ascertained the same by actual measurement with a chain and pole. A considerable part of said dam consists of large stones and rocks, many of which have never been moved, and cannot be moved, without blasting, and most of the logs, composing the dam, are braced in by the said rocks, lying in their natural places.

Testimony of Walter Fowler.

Walter Fowler testifies as follows, viz.

To the first interrogatory—The deponent is a miller and millwright, residing at Croton, and is employed in the mills in question, and has been employed in said mills for about seventeen years; that is to say, ever since the same were first erected, excepting four years, namely, the second, third, fourth, and fifth years.

To the fourth interrogatory—The deponent saith, that he, together with Samuel Mott, and Nathan Anderson, previous to the appointment of David Lydig as an appraiser, took a superficial view of the mills and premises in

question; the deponent accompanied the said Mott and Anderson, when they took the said view of the mills of the respondents, but not when they went to view the other mill, belonging to General Van Cortlandt; in the deponent's opinion, the said Mott and Anderson did not examine the said mills and appurtenances first mentioned, in such a manner as to enable them to form a just and correct estimate of their value; he does not know in what manner they examined the other mill; when they examined the said mills of the respondents, they made no particular inquiries of the deponent, as to the condition of the works and machinery, to know whether or not they were sound, and in good order; the deponent considered it at the time as amounting to a very slight examination.

To the seventh interrogatory—The deponent saith, that after the appointment of David Lydig as one of the appraisers, the deponent accompanied the three appraisers in question, in making their examination of the said mills, appurtenances, and premises: the deponent, supposing the said appraisers wished to see the mill-stones, had three of them turned up for that purpose; but they did not appear to take much notice of the same, nor examine them, in order to ascertain whether they were burr stones, or an inferior kind, and thereupon the deponent discontinued taking up any more of them; the works were set in motion in order that they might see them in operation, and when they were stopped they took a general view of the wheels and machinery, and they also looked into the cog-pit, but he does not recollect that they went into the same; that they then went under the mill, at least Mott and Anderson did, but he does not recollect that David Lydig went there. The deponent does not remember of their trying or inspecting any of the timber composing the frame of the mills, or shafts of the machinery, so as to ascertain their condition and state of repair, nor did they bore, to his knowledge, any of the timbers, though there was a man at-

tending, with an augur, for that purpose; but he was not desired by the said appraisers to make use of the same. To the best of the deponent's judgment, the said appraisers did not examine the said mills and appurtenances, in a manner sufficiently particular to enable them to form a just and correct estimate of their value, and the deponent remembers that he felt surprised at the time, at their not asking him more questions, and making stricter inquiries as to the condition of said mills, machinery, and appurtenances, as it must have been well known to Mott and Anderson, that the deponent, from his familiar acquaintance with the same, in consequence of his having been so long employed in said mills, was fully competent to give them the most accurate and minute account of the condition of said mills, machinery, and appurtenances.

To the fourteenth interrogatory—The deponent saith, that, as he has before mentioned, he is and has been, for many years, well acquainted with the mills and premises, particularly mentioned and alluded to in said interrogatory, and that for the reasons before mentioned, he has been for a long time well acquainted with the particular state of repair and condition of the same, as inquired about in said interrogatory, and particularly from the first day of May, 1813. The deponent does not think that there was any material difference in the condition and state of repair thereof, on the 22d day of November, in the said year from what they were on the 8th day of July preceding, except that, somewhere about the beginning of November, the main cog-wheel, while the said mill was in operation, suddenly gave way, and broke to pieces, from natural decay and rottenness, so that it was not capable of repair, and it became necessary to have a new wheel made, and put in its place; and, lastly, the deponent saith, that he thinks the business of the mills in question has decreased, since the 1st of May, 1813, but not in any considerable degree.

To the eighteenth interrogatory—The deponent saith, that he is well acquainted with the mill in question, occupied by Philip Van Cortlandt, and John F. Hollman, but he has never viewed the same for the particular purpose of inspection; he is of opinion, however, that it is more valuable than the other mill, built by the respondents. It consists of five floors, besides the garret, or cockloft, and has five run of stones, while the other mill has six run of stones, and four floors; that is to say, three full floors, and one over that part of the mill that was first built, but the deponent does not recollect which mill is of the greatest dimensions, as to length and width, but he is pretty certain, that the first mentioned mill is composed of sounder timber, and is a stronger building, than the one built by the respondents. The deponent is of opinion, that the first mentioned mill is the most valuable of the two, being in a better state of repair, and not so much exposed to the wet from below, and the drip from the race, as the other; and that its machinery is pretty much the same as that of the respondent's mill; and that, as far as the deponent can recollect, and has understood, the said mill of Van Cortlandt was built about three or four years after the other mill, though he was not there at the time; and the same has the appearance of being a newer mill, and better built.

To the nineteenth interrogatory—The deponent saith, that, as he has before mentioned, he is well acquainted with the mills and premises in question, and was employed by the respondents, the first year they were building; and after the same got into full operation, the deponent left their said employ, and was absent about four years, when he returned, and again entered into their employ, in which he continued, as the miller, until the expiration of the lease; and from that time to the present, he has continued therein in the same capacity. The deponent was there, as he has before mentioned, at the time the respondents ceased to use the same, and that, at the last mentioned time, se-

veral parts of said mill were in a decayed state ; that is to say, some of the frame of the building was a good deal decayed ; the roof was leaky, some of the main posts were rotten, and also several of the girts, or girds, were decayed, which was also the case with almost all the sills, and some of the sleepers ; some of the stone foundation was so much out of repair, that he does not think it would have been sufficient for erecting a new mill, though other parts were, and still are, good ; as to the machinery and running geer, it was a good deal worn, and, as the deponent has before mentioned, one of the two main cog-wheels gave way, and in the spring following, the deponent found it necessary to have a new shaft made for one of the water-wheels, on account of the rottenness of the old one ; at the time when the appraisement took place, the mill-stones were in good order, excepting one, which was a little deficient ; most of the bolts were in a decayed state, and a good deal patched. Between the first of May, 1813, and July following, the respondents made some repairs on the said mills, such as putting in a few new cogs, and something over some parts of the mill, by covering over certain decayed parts thereof with boards and shingles, where it had leaked ; and the floor on which the water had leaked, was strewn over with meal and bran, by the aforesaid Abraham I. Underhill, but whether for the particular purpose of hiding the marks on the floor or not, the deponent does not know ; and this was done just before the appraisers came, in consequence of which its appearance was made better. The principal part of the machinery aforesaid, had been used for said mills, during the whole time the deponent had been employed therein, such as the elevator straps, all the mill-stones, except one run, which had been set up about fourteen years before, and all the bolting cloths were the same that were originally put in, and he is certain that there were no new ones, except those for bolt-

ing what is called ship-stuff, which requires a coarse kind of cloth.

To the twenty-first interrogatory—The deponent saith, that as he has before mentioned, he has been employed in the mills in question, from the first of May, 1813, down to the present time, excepting the time when the said mill was not in operation, on account of the respondents not giving up possession thereof, which was some time in August; he has already mentioned the repairs that were made to the mill and machinery, and that, as to the raceway, some repairs were found necessary, as it was and still is a good deal out of order.

To the twenty-second interrogatory—The deponent saith, that the dam and raceway in question, at the time the respondents quit possession, were very much out of repair, and that the dam is now so much out of order, that it must be planked all the way across, and a considerable part of the raceway, which was out of repair at the time aforesaid, is still in the same bad condition; the dam and raceway aforesaid, excepting the stones composing a part of it, were not of a permanent nature, and, indeed, he does not think that any part of it was so substantial as to be called permanent. The respondents, however, occasionally repaired the same, in such parts as had decayed, and the dam has also undergone considerable repair, since the respondents quit possession.

To the twenty-third interrogatory—The deponent saith, that there was a mill on the premises in question, at the time the respondents took possession thereof, under their lease from the Van Cortlandts, and there was also a dam and raceway conducting water to said mill, and there was also, at the same time, the remains of another mill, at and near the said place; the two mills last mentioned were on the west side of the Croton river, and the mill of the respondents is on the other side; that the mill first mentioned was in operation at the time the respondents took their

lease as aforesaid, and they made use of the same, to the best of his recollection, until their new mills were in operation, at which period the saw-mill was no longer used as such.

CROSS EXAMINED.

To the eighth cross interrogatory—The deponent saith, that he assisted in measuring the raceway in question, and ascertained the same to be thirty-two rods in length: as to the dam, it is in some places about three feet at the highest, and at others not more than from three to two feet, but it differs in width in different places, and this is also the case with the raceway, which in some places is two, three, and four feet deep, and in some places less, and the same is the case with the flue: and that he knows all the above facts from experience. The dam is partly composed of large stones, but he does not know that many large ones were moved from their natural places to make said dam, and the deponent remembers, that he was present and assisted in building the same, and all the timber and materials were procured close by and on the spot, except some plank for the use of the dam.

To the ninth cross interrogatory—The deponent saith, that as he has before mentioned, he was employed as the miller in the mills in question: to the best of his recollection, they used to manufacture on an average from sixty, to one hundred barrels of flour per day, for one week, and that in one instance, when a very great exertion was made, a greater quantity was manufactured, but this occurred but once, and that the number of hands employed in said mills, were four men and a boy, but that sometimes there were more, and sometimes less, and that sometimes, when business was dull, there were only two or three.

Testimony of William Fowler.

William Fowler testifies, as follows, viz.

To the first interrogatory—The deponent has been em-

ployed as a miller, in the mills leased by his father, Walter Fowler, at Cortlandt-town. He has never been employed in superintending the building of mills, but has been employed in repairing the same.

To the fourth interrogatory—The deponent saith, that when Samuel Mott and Nathan Anderson viewed the premises in question, at the time referred to, he was with them all the while they were at the mill, the deponent being at that time employed in the business of the mill; that the said persons examined the mill, but it did not appear to him that they took a particular view of the same, or such a one as the deponent should suppose was sufficient to enable them to form a correct estimate of its value. He does not recollect of their going under the mill to examine the foundation, and he is certain that they did not go into the cog-pit, nor examine the bolting cloths or bolts.

To the seventh interrogatory—The deponent saith, that when the aforesaid Samuel Mott and Anderson, together with David Lydig, afterwards examined the mills in question, it did not appear to the deponent that they were as particular as at the previous time, when Mott and Anderson viewed the same alone, and as to Mr. Lydig, the deponent did not perceive that his view and examination of the premises was as particular as that of the other persons: the said persons walked through and about the mill, and then went and viewed the raceway and dam, but they did not go under the mill, though probably they might have looked at the foundation from the outside: he does not recollect their examining any of the timbers, or of measuring the mill, though he recollects that Abraham I. Underhill mentioned to them the dimensions thereof; the deponent is of opinion that the persons aforesaid did not examine the said mills in such a manner as to enable them to form a correct estimate of their value. The deponent was also present when they walked up the raceway, but he does not recollect their measuring the same.

To the fourteenth interrogatory—The deponent saith, that he has been acquainted with the mills in question about fifteen or sixteen years, and that he assisted in tending the same about six or seven years, while they were in the possession of the respondents, and that he has continued in them till the present time, in consequence of which the deponent has had opportunities of knowing the state of repair of said mills and machinery.

The deponent knows of no material difference in the state of the repairs aforesaid, between the 8th of July, and the 22d of November, in the year 1813, than what might be produced by the natural wear and tear thereof. The deponent does not think, that the mills and machinery, dam and raceway aforesaid, have decreased in value since the first of May, 1813, except from the natural decay, or the ordinary wear and tear thereof, and except what may be owing to the decrease of business, on account of changes in the state of the times.

To the nineteenth interrogatory—The deponent saith, that, as he has before mentioned, he was employed in the aforesaid mills at the same time with his father, Walter Fowler, as a miller, and that he was there in that capacity at the time the respondents quit possession in April, 1813. A short time before the expiration of the lease, the respondents had some repairs made to the said mills, that is to say, by wedging up, and endeavouring to raise some of the floor beams, that had settled in the year 1812, putting in a part of a new sill, and repairing some of the cogs; that the above mentioned repairs were made as aforesaid, after the respondents had ceased to use the said mills, their lease expiring in May, 1813, but they had stopped grinding in the winter of 1812, and did not put the mills into operation again the ensuing season, on account of their lease expiring in May. The said repairs had the effect of making the mill appear to better advantage, and he remembers that some decayed parts of the frame thereof

were covered over with boards, and that on the very day of the expiration of the lease, the respondent, Abraham I. Underhill, drove some shingles into the underside of the roof of that part of the mill which was an addition to the main building, it having rained the day before, and the water had leaked through upon the floor; and in order to hide the marks, he, the said Abraham I. Underhill, strewed meal or flour over the same, and then had the floor swept; that the said Abraham, also, had planks laid over the plate of the flue, which was decayed, and which had never been covered before, by which means the said decayed parts were concealed; this was done only one or two days before the expiration of the lease, and when he went away from the premises, he took away with him said planks. The deponent remembers of his taking away some other planks that Mr. Lee, the attorney at law, had advised him not to take, as they had been included in the appraisement, but he nevertheless took away the same. And, lastly, the deponent saith, that the whole of the machinery in said mill, at the expiration of the lease, had been used in the said mill during the whole time the deponent had been employed in the same, though it had been occasionally repaired, and that the same was the case with the running geers.

To the twenty-first interrogatory—The deponent saith, that he has been employed in the aforesaid mills since the respondents quit the possession, and until the present time, and that, in the fall of the year 1813, while the said mill was in the employ of the Van Cortlandts, one of the main cog-wheels gave way and went to pieces, from natural decay and rotteness, and it became necessary to make an entire new one, and that, in the year 1814, it became necessary to put in a new shaft for one of the water-wheels, the same having decayed; that the bolts and bolting cloths were very much worn, and none of them fit for superfine flour, and that they were obliged to mend them

almost every day. In the summer of the year 1815, the dam had become so much out of order as to render it necessary to rebuild nearly one third of it, and the other parts have been repaired this year, and that the raceway was in a very bad condition at the time of the expiration of the lease, but he does not recollect of any very particular repairs being made to it, though it is very necessary at present to have the same repaired, as it is much out of order.

To the first additional interrogatory—The deponent saith, that, as he has already mentioned in his answer to the nineteenth interrogatory, certain repairs were made in the said mills and premises by the respondents, just before the expiration of the lease, and that these were made before the aforesaid Mott and Anderson came to view the said premises, and that between the time that they so viewed the same, and the time when Mr. Lydig joined with them in the view and examination thereof, as before mentioned, there were two persons employed by the respondents for about a fortnight, in doing little jobs in the way of repairs in and about said mills, all which were calculated to make the same appear to better advantage.

To the second interrogatory—The deponent saith, that between the time of viewing the said premises, by Mott and Anderson, and the time when they viewed them together with David Lydig, boards were nailed up, by the direction of the respondents, against the cog-pit in the inside of the mill, so as to prevent persons from passing from under the mill into the body of the mill through the said cog-pit, but there were doors inside which could have been opened, so as to admit persons, when in the mill, to go into the cog-pit, but the said doors were not opened by the said appraisers. though, as they were not fastened, there was no difficulty in opening them, but Abraham I. Underhill told the deponent that the cog-pit was fastened

up in the way above mentioned, in order to prevent the aforesaid Van Wyck from getting into the mill.

To the third interrogatory—The deponent saith, that he has already mentioned, in his answer to the nineteenth interrogatory, the repairs that were made to the roof of the building mentioned in said interrogatory, and the method that was taken to conceal the marks on the floor, occasioned by the leaks, and that the same was done before the aforesaid Mott and Anderson came to view the premises.

Adonijah Cock testifies as follows, viz.

Testimony of Adon. Cock.

To the eleventh interrogatory—The deponent saith, that he has viewed and examined the mills, dam, and raceway, and premises mentioned and described in said interrogatory, both before, and subsequent to the 1st day of May, 1813, he having been in the habit of working as a millwright in and about said mills and premises, for eighteen years, by which means he has been in the habit of seeing and examining the same, from time to time, during the period aforesaid.

To the fourteenth interrogatory—The deponent saith, that he is acquainted with the said mills and premises, and has been, during the time before mentioned, acquainted with the particular state of repair and condition of said mills and their machinery, and the dam and raceway in question, and that this has been the case, also, since the 1st of May, 1813. The deponent, in the fall of the year 1813, was called upon, as a millwright, to make a new main cog-wheel for said mill, in consequence of the breaking to pieces of the old one through natural decay; and that it was in the month of November, in the said year, that he made a new cog-wheel in place of the one so broken, but which was not finished by the twenty-second of said month. The deponent does not recollect that there was any other difference in the condition of said mills, be-

tween the periods of time inquired about. In the said month of July, [July, 1813,] said cog-wheel was not broken, though it must have been very rotten; and, lastly, the deponent does not know that the mills and premises in question, have decreased in value since the 1st of May, 1813, except from the natural decay, and the ordinary wear and tear thereof.

To the nineteenth interrogatory—The deponent saith, that he has been employed as a millwright, in the mills in question, for eighteen years, to the present time. He was originally employed as such by the respondents, and continued in that capacity until they quit the possession; and the last work he did for them, as such, was in April, 1813. At the time the respondents quit the possession, the works and machinery of said mill, though capable of doing considerable work, with some attention to repairs, yet had become old and weak, and having been but slightly made originally, they were often giving way, and getting out of order. The deponent, however, does not recollect of making any other particular repairs to the said mill and machinery, during the year 1813, than what he has before mentioned. The deponent, however, remembers that, in April, in the year aforesaid, he made some repairs in the frame and building of said mills, by the direction of the respondents, that is to say, he took up some of the flooring, and, after wedging up the beams, and sawing off the lower ends of some of the posts, and putting pieces of new sills underneath, the flooring was laid down again, and the building, in consequence thereof, made a much better appearance than before. There were, also, some new weather boards put on, but he does not recollect of any shingles being used, as inquired about in said interrogatory, though the roof of the additional building was very leaky; and, at the time last mentioned, he also made, and put in, a new shaft for a small cog-wheel.

To the twenty-first interrogatory The deponent saith,

that, as he has before mentioned, he was employed in the mills in question, in the manner before mentioned, during the year 1813; and that, as to repairs in the raceway, he does not remember repairing the same by putting in any new timbers, but that he propped up and braced several of them, at or about the time referred to in said interrogatory; and that the wooden part of said raceway was very rotten and a good deal out of order.

To the last interrogatory—The deponent saith, that when the mill in question was first built, it was made with horizontal water-wheels, in consequence of which the lower parts of the building were made damp, and a muggy steam was created, which affected the timbers above, and rotted them; and that such was the effect on the frame of said mill, until an alteration took place, about fourteen years ago, when the deponent, as the millwright, changed the same to an overshot wheel, the shaft of which is still remaining and in use. In the month of March last, Walter Fowler, the miller employed in said mill, and the deponent, as the millwright, while they were fixing and putting the works in order for grinding, at the proper season, were of opinion that the frame of the mill would not be worth the putting in a new set of works and machinery, and it is pretty evident that the said works and machinery cannot last much longer, being old and much the worse for wear, so that a miller, not well acquainted with it, would find it difficult to keep the same a going.

John F. Hollman testifies as follows, viz.

Testimony of John F. Hollman.

To the first and second interrogatories—The deponent is a miller residing at Cortlandt-town, in the county of West Chester, but has never been employed in building, or superintending the building of mills.

To the seventh interrogatory—The deponent saith, that he was not present on the first day, when the appraisers in question came to view the mills and premises mention-

ed in said interrogatory; but that, on the next morning, he was in the mill of the respondents, when the said appraisers came there; and that the said appraisers went through said mills, and looked at one or two of the millstones that were taken up, and at the machinery in general, but they did not go into the cogpit, nor does he recollect of their going under the mill to look at the foundation, though they may have done so the afternoon before, when they began the examination, and when the deponent was absent. None of the timbers of the frame were bored, though there was a carpenter present with an auger for that purpose, but he was not required to use the same. The deponent was of opinion, at the time, that the said appraisers did not take such a view of the premises as was sufficient to enable them to form a just and correct estimate of their value, though he does not know how far they carried their examination the afternoon before.

To the twelfth interrogatory—The deponent saith, that he is acquainted with Robert M'Queen and Scudder Waring, mentioned in said interrogatory, but that he is only slightly acquainted with Justus Thorn. The deponent is of opinion, that said Robert M'Queen is fully competent, from his occupation and business, to form a true and correct estimate of mills and their appurtenances, and he also thinks, that the said Waring is also a good judge thereof, but that he is not acquainted with the talents of Mr. Thorn. The standing of the said Robert M'Queen in society, as a man of integrity and experience, relating to his business and profession, is high, and the deponent has always heard him well spoken of in that respect, and that he has never heard any thing against his character; and that Waring, also, bears a good character, and is considered a very good workman in the millwright business.

To the thirteenth interrogatory—The deponent is only very slightly acquainted with Samuel Mott and David Lydig, and knows the said persons only as flour merchants,

and, although he believes they both own, or owned mills, yet he considers them less competent than the said M'Queen and Waring, to form a true and correct estimate of the value of mills and their appurtenances.

To the nineteenth interrogatory—The deponent saith, that, as he has before mentioned, he is well acquainted with the mills and premises in question, but that he never was employed therein; that the state and condition of the mills and premises was as follows, viz.: the machinery might be justly considered as half worn out, some parts of the frame were decayed, and the roof of the part called the addition, was very leaky; the dam and raceway were, also, in some degree, out of repair. The deponent remembers, that after the respondents quit possession, a new main cog-wheel was put in, in place of the old one, that had become rotten, and was broke. The deponent recollects, that the respondents made some repairs to the said mills shortly before the appraisers came to view the same, such as putting in a part of a new sill on the east side of the building, and raising up some of the floor beams that had settled, and also repairing the flue and things about the water-wheels, and putting in some cogs in the machinery heads.

To the twenty-second interrogatory—The deponent saith, that he has paid particular attention to the dam in question, for six or seven years last past, on account of its being the common dam for the mills in question, and for those occupied by the deponent and Philip Van Cortlandt; that the said dam, consisting in part of logs and plank, could not be considered as permanent, and was liable to get out of order, by means of the ice and natural decay, and when the gravel washed away, as was often the case, it used to cost a good deal, in the way of repairs; and that the raceway has also occasionally required repairs.

To the eighteenth interrogatory—The deponent saith, that he is well acquainted with the mills mentioned in said

interrogatory, and which is occupied by the deponent and Philip Van Cortlandt. The deponent has compared the machinery of said mill with that of the other, formerly occupied by the respondents, but he has never taken means to ascertain, exactly, the size and dimensions of the last mentioned mill. The machinery of the first mentioned mill is more simple, and better calculated to do business to advantage, than the other, and is in a better state of repair. The first mentioned mill has six floors, and the other only four, and what may be called a half floor; the timber of the frame is perfectly sound, while that of the other is a good deal decayed. The first mentioned mill is also greater in dimensions, as it relates to storage, there being more floors, though the other mill is broader and longer, but has not so many floors. The deponent is of opinion that the mill aforesaid, occupied by him and Mr. Van Cortlandt, is twice as valuable as the other aforesaid mill, but that he does not know the particular year when the first mentioned mill was built.

CROSS EXAMINED.

To the fifth cross interrogatory—The deponent saith, that although he has never been employed in building mills, yet that, as one of the owners of the mills, in which he is jointly concerned with Mr. Van Cortlandt, he has been engaged in repairing said mills, from time to time, or rather in superintending the mill-wright, by which means he has acquired some knowledge on the subject, and sufficient to enable him to judge of good work.

To the sixth cross interrogatory—The deponent saith, that the mill, occupied by him as aforesaid, is one of the description enquired about in said interrogatory [merchant mills.] That he has no particular knowledge of the cost of building such mills, from actual experience, but he knows that mills, for manufacturing purposes, may be built at much less expense than some other mills of that kind.

which, though more expensive, are not capable of performing more work.

To the seventh cross interrogatory—The deponent saith, that he is not much acquainted with the expense of building dams and raceways, but he has been engaged in having them repaired, and has paid the bills of expense; and that this took place with the dam and raceway belonging to the mill occupied by him and Mr. Van Cortlandt, and that the expense of repairing the dam was in common between them and the respondents, as both the said mills were supplied with water by means of the said dam.

Testimony of Joseph Tompkins.

Joseph Tompkins testifies as follows, viz.

To the first interrogatory—The deponent is a miller, and resides in York-town, in the county of West-Chester, and has built and superintended the building of two grist-mills belonging to himself, on the Croton river, but he is not a mill-wright.

To the eleventh interrogatory—The deponent saith, that since the month of May, 1813, he has seen and viewed the mills, dam, raceway, and premises, mentioned and described in said interrogatory, but he did not take such particular notice of the machinery, as to judge of its condition; that he took the dimensions of the dam and raceway, the last time he viewed the same, which was in this present month of June, [June, 1816,] though he had seen and viewed the premises frequently before that time. The deponent having dug a raceway for his own mills, which was as long, though not as wide, as the respondent's, he conceived himself, in some measure, competent to form an estimate of what the raceway and dam in question must have cost, and according to the best of his judgment, the same could not have cost more than about fifteen hundred dollars; the race and dam of the deponent having cost no more than six hundred dollars.

To the twelfth interrogatory—The deponent saith, that he is acquainted with Robert M'Queen, Scudder Waring and Justus Thorn; the first of whom made certain parts of the machinery for the deponent's mills, before mentioned, and the two others were employed by the deponent, as the mill-wrights. The said persons are men of experience in their occupation and professions, as aforesaid, and he considers them fully competent to form a true and correct judgment and estimate of the value of mills and their appurtenances. The said persons are generally reputed to be men of veracity and integrity, and as entitled to the fullest confidence in matters relating to their said respective professions and callings; and the said Justus Thorn has, to the deponent's knowledge, been several times employed, by different people, to appraise and value mills.

To the sixteenth interrogatory—The deponent saith, that as he has before mentioned, he viewed and measured the dam and raceway, mentioned and inquired about in said interrogatory, and that from the experience which he has had in the business of making a dam and raceway on the same river, and through and upon pretty much the same kind of ground and surface, he is of opinion, that, if the premises in question were in a state of nature, and as they were, before the respondents took their lease, that a dam and raceway might be made, in the same place, where the respondents made theirs, and of the same kind and dimensions, for about the sum of fifteen hundred dollars.

Testimony of Daniel W. Birdsall.

Daniel W. Birdsall testifies as follows, viz.

To the first interrogatory—The deponent owns a grist-mill, and has carried on the milling business, since about the year 1803, in grinding for the country.

To the twelfth interrogatory—The deponent is well acquainted with Scudder Waring and Justus Thorn; the said persons are mill-wrights, and the said Thorn, in particular, has a high reputation, as a mill-wright, and the said Wa-

ring is also considered skilful and experienced in his said profession; and the deponent is fully of opinion, that the said Waring and Thorn are competent, from their occupation, profession and business as mill-wrights, to form a true and correct estimate of mills and their appurtenances; that the said persons bear good characters, and he has never heard any thing against their integrity or talents.

James Diven testifies as follows, viz.

Testimony of James Diven.

To the twelfth interrogatory—The deponent saith, that he knows Robert M'Queen, Scudder Waring, and Justus Thorn; his knowledge, however, of the latter is better than of either of the others, and he is reputed, in the deponent's neighbourhood, to be the best mill-wright and mill-builder in that part of the country; and the deponent considers him fully competent, from his long and great experience in the business before mentioned, to form a true and correct estimate of mills and their appurtenances. The said Thorn has been employed, in the business of a mill-wright, and in building mills, for nearly twenty years past, in different parts of the country, up the North-river, and particularly in Dutchess county; and he is one of the most active mill-wrights the deponent knows of. The deponent does not know much of the experience and skill of Scudder Waring, though he has often heard him spoken of, as a mill-wright, and he is a man of a good character; with respect to Mr. M'Queen, the deponent has known him, as a mechanic, and that he made castings for mills, and other machinery, but the deponent does not know what are his talents as a mill-wright. The said Justus Thorn bears a good character, and is considered a man of integrity and fair dealing; and Waring and M'Queen are, in like manner, men of good reputation.

To the thirteenth interrogatory—The deponent saith, that he knows one Samuel Mott, who used to have mills at New Rochelle, but he does not know he is the one alluded

to in said interrogatory; nor does he know his competency, as an appraiser of mills; the deponent has known David Lydig many years, as a flour merchant and owner of mills, and that he has had a vast deal of work done in that way; and, although he must certainly know what are the cost and expenses incurred in building mills, yet the deponent thinks that Justus Thorn is as good, if not a better judge, of what the work ought to cost; and, in the deponent's opinion, the said Thorn, from the nature of his occupation and business as aforesaid, is a more competent judge, of the value of mills and their appurtenances, than the said David Lydig; but that he does not know that this is the case with the two other persons, namely, M'Queen and Waring.

Jacob Doughty testifies as follows, viz.

Testimony of J. Doughty.

To the first interrogatory—The deponent is a farmer, and owns a mill.

To the twelfth interrogatory—The deponent saith, that he knows Robert M'Queen merely by sight, but that he is better acquainted with Justus Thorn, and still more so with Scudder Waring; that he has known the said Waring about four years; and that, in the year 1814, to the best of his recollection, as to the time he was employed, together with the said Justus Thorn, by the deponent and his brother, to build a mill for them in Beekmantown, and they, accordingly, built and finished the same. The said mill consisted of two run of stones, but had not as much machinery as is sometimes put in larger mills; and that they completed the work to the satisfaction of the deponent and brother. The said Justus Thorn, as the deponent understood, built mills for Governor Lewis, and he has heard of the said Waring's being employed in building mills in other places; the deponent, from his knowledge of the skill and experience of the said Waring and Thorn, from the circumstances before mentioned, is of opinion that they are fully

competent, from their occupation and experience, to form a true and correct estimate of mills and their appurtenances; and, as to their characters, he believes them to be men of honesty and good faith, and he has never heard any thing to the contrary; and, lastly, the deponent saith, that, when he and his brother were about building the aforesaid mills, they made inquiries of their friends, as to the best men to engage in that undertaking, and the said Waring and Thorn were recommended to them as such, and were spoken of as fully competent to the business.

Testimony of Stephen N. Bayard.

Stephen N. Bayard testifies as follows, viz.

To the first interrogatory—The deponent saith, that he is employed in the milling business, together with his partner, W. Mynderse, at the Seneca Falls; and the deponent, together with said partner, built and superintended the building of said mills; that is to say, his partner superintended them, at the place aforesaid, and the deponent attended to the procuring of materials necessary for the same, that were to be obtained in this city, and he also engaged Robert M'Queen to furnish a plan for said mills, and he, the said M'Queen, went there accordingly, and attended to the work, or rather to give directions to a Mr. Grove, a mill-wright, employed by M'Queen to execute the work.

To the twelfth interrogatory—The deponent saith, that he is acquainted with Robert M'Queen, he having been employed by the deponent and partner, as before mentioned, to build mills for them, that is to say, two grist-mills, at Seneca Falls; and the deponent, from this knowledge of the skill, experience, and judgment of the said Robert M'Queen, considers him fully competent, from his occupation, profession, and business, as aforesaid, to form a true and correct estimate of mills and their appurtenances; and the deponent has always regarded the said M'Queen, and heard him spoken of by others, as a man of unexcep-

tionable character, as to probity and good faith; and he is generally esteemed as a man of talents in his business, and as one of the most able mill-wrights in this state.

Testimony of G. Tompkins.

George Tompkins testifies as follows, viz.

To the first interrogatory—The deponent is a mill-wright, and resides at Paulus Hook, and has been employed in the building and superintending the building of mills, for about thirty-two years.

To the twelfth interrogatory—The deponent saith, that he is acquainted with Robert M'Queen and Justus Thorn, the former of whom he has known for 18 years, and the latter for about 24 years, but is not personally acquainted with Scudder Waring, though he has seen him. Robert M'Queen, as long as the deponent has been acquainted with him, has been employed in the working at mills, and making machinery for mills of different kinds, and that the same has been the case with the said Justus Thorn. The deponent could mention a great number of mills and iron works that both the said M'Queen and Thorn have been employed in building for different persons throughout the country, and, from their great experience in the milling business, as before mentioned, the deponent considers them fully competent to form a true and correct estimate of mills and their appurtenances. The said M'Queen and Thorn have great reputation in their profession, and their standing in society, as men of probity, integrity, and talents, is unexceptionable.

Testimony of Robert M'Cord.

Robert M'Cord testifies as follows, viz.

To the twelfth interrogatory—The deponent saith, that he knows Robert M'Queen merely by having seen him in this city, [New-York.] That Justus Thorn he has known for twenty-six or twenty-seven years, and he first became acquainted with him when he, the said Justus, was an apprentice to a mill-wright; that the said Justus Thorn is ge-

nerally considered and spoken of, among the deponent's acquaintances, and others, as the first mill-wright in West-Chester county. The deponent knows of his building a mill for Joseph Tompkins, in Yorktown, consisting of two run of stones; and he understood he built one for Mesier, at Wappinger's Creek, and also iron-works for Mr. Brewster, and the deponent knows of his being employed in other places, in repairing mills. As to the said Scudder Waring, the deponent has known him about twelve years, and although he is not thought to possess as great natural talents, as a mechanic, as the said Justus Thorn, yet that he is considered a good and capable workman, as a mill-wright, and has almost as much reputation in his profession, as the said Justus Thorn. The deponent, from the skill and experience of the said Thorn and Waring, is of opinion that they are fully competent to form a correct estimate of mills and their appurtenances; and, as to their character, they enjoy a good reputation, and are generally regarded as men of truth and good faith, and he does not know, nor has he ever heard, any thing against their characters.

To the twenty-third interrogatory—The deponent saith, that he is well acquainted with the mills and premises mentioned and referred to in said interrogatory, and that, previous to the building of said mills by the respondents, there were two grist mills standing on the said premises, one of which, however, was not in use at the time of building said new mill, but the other one was. It had only one run of stones, but was very much resorted to, and used to be considered as the principal mill in that part of the country, on account of its having a never-failing supply of water. The deponent, when a lad, used to go to said mill, frequently, with grain, and when the respondents began to build their mills, on the premises, the said mill was still going, and they made use of it for grinding. The deponent lived on said premises at the time the respon-

dents began their said mill, and that the said old mill was then tended by John Bice, but how long they continued to use the same the deponent does not know, as he went away from the premises not long afterwards.

To the fourth additional interrogatory—The deponent saith, that, as he has before mentioned, he is well acquainted with the premises in question, and that he worked in the employ of the respondents, at the time of their erecting said mills, and that he assisted in getting the stone for the foundation, and also assisted in digging the raceway. While the deponent worked there, as aforesaid, all the stone for the said foundations was taken from off the said premises in question, as inquired about in said interrogatory, though he was occasionally absent, and he does not know, to a certainty, whether or not, during that time, stone was taken from any other place, for the purpose aforesaid. As to the raceway, he recollects of no stones being used for the same but what were taken from the spot. He did not work at the dam, but, as the bed of the river is very stony, he thinks it probable that no other stone or gravel was used than what was found on the spot, or close by.

To the fifth interrogatory—The dug part of the raceway in question is about thirty rods, the rest of it being formed by a small island. The dam commences at one end of said island, and stretching up the river a little way, then extends across to the other shore, but he does not recollect the length thereof. The said dam is principally made of logs laid upon, and connected with, the large stones in the bed of the river, and on the shore. He does not recollect, however, of there being much gravel in said dam.

John Bice testifies as follows, viz.

Testimony of John Bice.

To the twenty-third interrogatory—The deponent saith, that he knows the mills and premises, mentioned and in-

quired of in said interrogatory, and that, before the respondents built the mills in question, under their lease from the Van Cortlandts, there were two mills erected on the said premises, one of which was in operation at the time the respondents began to build their said mills, but the other had gone to decay, and was not used. The one first mentioned, which was in operation, had a dam and raceway conducting water thereto. The deponent occupied the said mill, and worked it upon shares with General Van Cortlandt, but he removed from thence to the distance of about three miles, when the respondents took possession of the premises, and, as the said mill was then serviceable and in use, he presumes the respondents had the use of it while their new mills were building, but he does not know this, positively, as a fact.

Solomon Teller testifies as follows, viz.

Testimony of Solomon Teller.

To the twenty-third interrogatory—The deponent saith, that he is well acquainted with the mills mentioned and referred to in the said interrogatory, which were built by the respondents upwards of twenty years ago. When the respondents began their said mills, there were two grist-mills on the said premises, one of which was out of use for grinding, and used as a store-house and cooperage, but the other was in operation, and ground for the country. The deponent lived, at that time, in the same house with John Bice, who tended the said mill, and the respondents began to use the said last mentioned mill, at the time the said Bice and the deponent moved away from the premises, namely, at the time they began to build their mills. About eight months afterwards, the deponent went to the said old mill with a load of grain, and found the said mill in operation, under the respondents, and in their occupation, at which time their new mills were not completed.

John Peterson testifies as follows, viz.

Testimony of John Peterson.

To the twenty-third interrogatory—The deponent saith, that he is well acquainted with the premises mentioned and described in said interrogatory, when the respondents built their mills, under their lease from the Messrs. Van Cortlandts; and that the deponent worked in their employ, as a labourer, when they first began to cut the timber for building their aforesaid mills on the premises in question. When the respondents began to build their said mills, there were two grist-mills on the premises, one of which was not in use as a mill, but the other one was used as such, and ground for the country. The respondents, while they were building their said new mills, occupied and used the said two grist-mills, and the deponent remembers going to the said mill that was in use as aforesaid, with corn, and having the same ground there by Mr. Underhill, one of the respondents; and the deponent believes that the respondents continued to use the said last mentioned mill, until their new mills were finished.

Garret Williams testifies as follows, viz.

Testimony of G Williams.

To the last interrogatory—The deponent saith, that, after the ground had been levelled, for the raceway aforesaid, a black man was employed in digging out the same, and had proceeded about three or four rods, when the deponent spoke to the respondents, to know if he could not have some part of said job, when he was informed by them, that the said black man was already engaged for that purpose, and that it was his job, or words to that effect. The deponent understood, at the time, and it was a thing well known, that the said black man was to have one shilling a foot in length, for digging out said raceway, and the same being about four feet deep, and five or six feet wide, he was able to earn seven or eight shillings a day, which was more than as much again as the deponent earned by working at the

dam, he receiving only three shillings and sixpence per day.

To the fourth additional interrogatory—The deponent saith, that the dam in question was composed of stones and timber, and some gravel, and that most of said stones were made use of in the said dam, without being moved from their natural situation; the bed of the river being full of rocks and stones, and the timber used in said dam was braced against the stones, and the upper side thereof covered with short planks, and he does not recollect that any other stones were used than those that were found on the spot, or close by, and that the gravel made use of was taken from the shore, or bank, on each side. The deponent saith, that he does not recollect in particular, where the stones were procured that were used in the foundation of the mill; he believes, however, that every stone used therein was taken from off the premises, as the place is very stony.

On the 26th day of August, 1816, the following order was entered in the cross suit, viz.

At a court of Chancery, held for the state of New-York, at the city of Albany, on the twenty-sixth day of August, in the year of Lord one thousand eight hundred and sixteen.

Present,

The Honourable James Kent, Esq. Chancellor.

Philip Van Cortlandt, Pierre Van Cortlandt, Catharine Van Wyck, Gerard G. Beekman, and Cornelia, his wife, and Philip S. Van Renselaer, and Ann his wife, against *Abraham I. Underhill, Joshua Underhill, Samuel Mott, and David Lydig.*

On reading and filing the affidavit of William N. Dyckman, junior, the solicitor for the complainants, and on motion of Mr. Henry, on behalf of Mr. Munro, of counsel for the complainants and defendants, respectively, it is ordered, that the depositions of Thomas Burling, William Burling, Joseph Tompkins, Walter Fowler, Daniel W. Birdsall, Adonijah Cock, John F. Hollman, Scudder Waring, James Diven, Justus Thorn, John Bice, Solomon Teller, John Peterson, Robert M'Queen, Jacob Doughty, Robert M'Cord, William Fowler, Garret Williams, George Tompkins, and Theodorus C. Van Wyck, taken before Anthony Bleecker, Esq. in a certain cause, wherein the above named defendant, Abraham I. Underhill, and Joshua Underhill, are complainants, and the above named complainants are defendants, may be read at the hearing of this cause, and in all subsequent proceedings therein, subject to all just exceptions to the competency of such proof.

Order that the testimony in the original suit may be read in the cross suit.

Nathan Anderson was afterwards examined in the cross suit, and his testimony being the same as in the original suit, is not repeated.

Both causes were argued together before the chancellor in September term, 1816.

On the 20th of January, 1817, before the chancellor pronounced his decree, the following petition was filed on the part of the appellants, viz.

Petition of appellants offering to release the mill seat to the respondents.

IN CHANCERY.

State of New-York.

Philip Van Cortlandt and others against *Abraham I. Underhill, and Joshua Underhill.*

To the Honourable James Kent, Esq. Chancellor of the said State,

Humbly Sheweth,

That the above cause has been heard, and is now before your Honour to be decided: that your petitioners have

concluded that it would be more eligible for them, instead of paying the deponents the eighteen thousand dollars, the sum at which the mill and other premises, for that purpose specified in the bill of complaint of your petitioners, have been appraised, by appraisers, as set forth in said bill, to relinquish the said premises to the said defendants, and least it might be objected to such offer, on the part of your petitioners, unless made while the decision is yet unknown, it will be too late in the event it should be against your petitioners:

Your petitioners, therefore, humbly pray, that your honour will decree, and, as by their counsel, your petitioners release all, and every the said premises to the defendants, in fee, together with the lands whereon the same are, and such quantity of land, adjacent thereto, as may be requisite to the full and entire use, occupation, and enjoyment of the said premises; the whole to be comprehended within such limits and bounds, and to contain such quantity, as your Honour shall deem meet and reasonable.

January 20, 1817.

M. Van Beuren, *of Counsel for Complainants.*

Thos. Addis Emmet, *of Counsel for Complainants.*

The offer, on the part of the appellants, as contained in the petition, not having been accepted by the respondents, the petition was dismissed.

On the twenty-seventh day of January, 1817, the Chancellor made the following decree in both suits, viz.

Decretal order of the Chancellor in both suits.

At a court of chancery, held for the state of New-York, at the capitol, in the city of Albany, the twenty-seventh day of January, in the year of our Lord, one thousand eight hundred and seventeen.

Present,

The Honourable James Kent, Esq. Chancellor.

Abraham I. Underhill, and Joshua Underhill, against *Philip Van Cortlandt, Pierre Van Cortlandt, Catharine Van Wyck, Gerard G. Beekman, and Cornelia his wife, and Philip S. Van Rensselaer, and Ann his wife.*

Abraham I. Underhill, Joshua Underhill, David Lydig, and Samuel Mott, impleaded with Nathan Anderson ads. *Philip Van Cortlandt, Catharine Van Wyck, Gerard G. Beekman, and Cornelia his wife, and Philip S. Van Rensselaer, and Ann his wife.*

The first of these entitled causes being an original, and the other a cross cause, and the said causes having been brought to a hearing together, at the last September term of this court, held at the city of New-York, and the matter being opened and debated by counsel for the parties respectively, that is to say, by Mr. Harison, and Mr. Riggs, on behalf of the complainants in the original, and of the defendants, excepting Nathan Anderson, in the cross cause, and Mr. Emmet, and Mr. Van Wyck, for the other parties, and the pleadings, proofs, and exhibits, being read and duly considered, whereupon, and on motion of Mr. Robert P. Lee, solicitor for the complainants, his honour, the chancellor, this day, hath ordered, adjudged, and decreed, and by virtue of the power and authority of this court, doth, accordingly, order, adjudge, and decree, that the bill, in the cross cause of the said Philip Van Cortlandt and others, the complainants therein, as against the said

defendants, in that case, Abraham I. Underhill, Joshua Underhill, David Lydig, and Samuel Mott, be dismissed for want of equity; and the same is, and hereby stands dismissed, accordingly, with costs of suit to be taxed: and that the said defendants, as to whom the said bill is dismissed, have execution for the said costs according to law, and the course of this court: and the chancellor doth declare, adjudge and decree, that the valuation or appraisement, in the pleadings mentioned, of the mills and whatever appertained thereto in the pleadings, also mentioned, and, also, of all the other buildings situate on the demised premises, in the pleadings referred to, made by Samuel Mott, Nathan Anderson, and David Lydig, on or about the eighth day of July, in the year one thousand eight hundred and thirteen, is binding and conclusive upon the parties, complainants and defendants, in the original cause; by means whereof the said complainants, Abraham I. Underhill, and Joshua Underhill, became, and were, entitled to claim, and receive from Pierre Van Cortlandt, since deceased, and the present defendant, Philip Van Cortlandt, who were the only original defendants, in the said original cause, immediately after the said valuation or appraisement was made, the sum of eighteen thousand five hundred dollars, being the amount of the said valuation, or appraisement; and the said complainants are now entitled to receive the said last mentioned sum of money from the now defendants, Philip Van Cortlandt, Pierre Van Cortlandt, Catharine Van Wyck, Gerard G. Beekman, and Cornelia his wife, and Philip S. Van Rensselaer, and Ann his wife, the said Philip Van Cortlandt being personally responsible to the said complainants for the said sum of money as an original contracting party, and the said Philip Van Cortlandt, and Pierre Van Cortlandt, Catharine Van Wyck, Gerard G. Beekman, and Cornelia his wife, and Philip S. Van Rensselaer, and Ann his wife, being answerable to the said complainants for the

said sum of money, as the real and personal representatives of the said Pierre Van Cortlandt, deceased, who was formerly a defendant in the original cause, to be paid out of the personal assets which were of the said Pierre Van Cortlandt, deceased, at the time of his death, in a due course of administration, if the same be sufficient, and if the personal assets be not sufficient, then that the lands and real estate whereof the said Pierre Van Cortlandt, deceased, died seised, situate in this state, and which descended upon the said defendants, or any of them, by the decease of the said Pierre Van Cortlandt, deceased, or which he devised to the said defendants, any or either of them, in and by his last will and testament, in the pleadings mentioned, and which remain in their hands, or in the hands of any of them, are to be, and are hereby made liable to make up what the personal assets shall be deficient to satisfy the said complainants the sum before mentioned, with interest thereon, if interest thereon shall be hereafter allowed upon the same by this court. And it is further declared and decreed, that the said defendants are entitled to receive from the complainants the value of the timber referred to in the lease, in the pleadings set forth, cut and used by the complainants, or others, formerly their co-lessees, for the building any mill or mills, or other buildings, on the said demised premises, estimating the said value of the said timber as it was when standing, and immediately before it was cut down, according to the provisions of the said lease, in that behalf; which last mentioned value, when ascertained, to be deducted from what shall be found due, and allowed to the complainants by this court. And it is, therefore, further ordered and decreed, that it be referred to a master in chancery for the state of New-York, to take an account of what is due to the complainants, on the foot of the said valuation or appraisement, made by the said Samuel Mott, Nathan Anderson, and David Lydig, herein before mention-

ed, by calculating lawful interest thereon, from the said eighth day of July, in the year one thousand eight hundred and thirteen. And that the said master, also, take an account of what is due to the defendants for the timber cut by the complainants, or others, their former co-lessees, on the lands which were of the said Pierre Van Cortlandt, deceased, and Philip Van Cortlandt, or either of them, and used by them for the building any mill or mills, or other buildings, on the premises demised, in and by the lease, in the pleadings mentioned, computing the value of the said timber as it was when standing, and immediately before the same was felled. And it is further ordered, that the said master, also, take an account of the personal estate, which was of the said Pierre Van Cortlandt, deceased, at the time of his decease, and of the administration thereof, and of what remains thereof undiminished, and an account of the real estate and chattels real, whereof the said Pierre Van Cortlandt, deceased, died seised, possessed, or entitled to, and the value thereof, and upon which of the said defendants the said real estate, or any part thereof, descended, at the death of the said Pierre Van Cortlandt, and to which of the said defendants, the said Pierre Van Cortlandt, deceased, in and by his last will and testament, devised the real estate, whereof he died seised, or to which he was entitled, and the situation and value of all such real estate, whereof the said Pierre Van Cortlandt died seised; and that the master report to the court, on the premises, with all convenient speed. And the question of allowing interest to the complainants, on the said eighteen thousand, five hundred dollars, as, also, the question of costs, in the original cause, and all further directions therein, are reserved, until the master's report shall come in.

From this decree an appeal has been filed in each suit.

The following points are submitted, on the part of the appellants, viz.

1st. That the appraisement or valuation, mentioned in the pleadings, ought not to be enforced against the appellant's, because

2d. The appraisement is grossly excessive, extravagant, and unjust.

3d. Because the said appraisers did not duly examine the property and premises to be appraised; nor fully hear the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, and their witnesses, on the matters submitted to them—but held a private and ex-parte interview with the respondent, Abraham I. Underhill, and received from him false statements of facts, on which they acted, in estimating the value of the property appraised.

4th. Because unjust and improper means were used to make the property to be appraised, appear more valuable than it really was, and to conceal from the appraisers the true state of repair in which it was.

5th. Because the appraisers estimated and valued, and included in the said appraisement, certain licenses or patent rights, and other property, which ought not to have been appraised, and against which the appellant, Philip Van Cortlandt, and the said Pierre Van Cortlandt, deceased, objected.

6th. Because the appraisers proceeded with so much haste and negligence, as not to become possessed of a full knowledge of the subject matters submitted to their judgment, and made up their appraisement without due observation.

7th. That the appellants ought to be allowed for the timber cut by the lessees or their order, either on the demised premises, or other lands of the appellant, Philip Van Cortlandt, and Pierre Van Cortlandt, deceased, or either of them, and as for waste of every kind, committed, or suffered by the said lessees.

8th. That the original bill ought to be dismissed, with costs.

9th. That a feigned issue ought to be directed to ascertain the value of the mills and appurtenances. The value of the timber and wood cut by the lessees, on the demised premises and other lands, belonging to the lessees, for other purposes than fire-wood, to be used on the premises; and the amount of the damages, occasioned by the waste, committed and suffered by the lessees.

10th. That the court ought to direct what matters and things shall be considered, as appertaining to the said mills; and that nothing ought to be considered as so appertaining, except the machinery in and about the mills; and, particularly, that the licenses to use Evans' machinery, ought not to be considered as appertaining.

11th. That the decree of the chancellor ought, therefore, to be reversed, with costs.

12th. That the offer of the appellants, to release to the respondents the whole premises in fee, and a further quantity of land, as mentioned in the petition, and the refusal to accept the offer, afforded a sufficient ground for the court of chancery, and for this court, to order a new trial, or new appraisement.

WM. N. DYCKMAN, Jun.
Solicitor for the Appellants.

THOS. ADDIS EMMET,
JOHN V. HENRY,
M. VAN BEUREN,
PIERRE C. VAN WYCK,
} *Of Counsel for the Appellants.*

CHANCELLOR'S DECREE.

THE CHANCELLOR.—The original suit between these parties was brought to enforce the performance of an award, and the cross suit was for the purpose of relief against it.

The sum awarded, on the valuation of certain property, was 18,500 dollars. And this has been deemed, by the party against whom it was awarded, as an excessive valuation. A variety of objections have, accordingly, been taken to the proceedings of the arbitrators, which have necessarily led the parties into voluminous pleadings and proofs; and it now becomes my duty to give these objections all the consideration and discussion to which they may be entitled.

The misconduct of the arbitrators, is one ground for setting aside an award. The misconduct charged in this case is principally from the refusal to hear evidence offered by one of the parties, and from holding a private and *ex parte* communication, on the subject before them, with the opposite party.

1. As to the rejection of evidence.

The cross bill charges, that Theodorus C. Van Wyck, the agent of Pierre Van Cortlandt, one of the defendants in the original suit, informed the appraisers, before they made their award, that "he had material testimony to submit respecting the matters submitted; and that Lydig, one of the appraisers, declared he could not wait to receive the

testimony, and this declaration was not opposed by the other appraisers; and, in consequence of that declaration, the testimony was not produced."

The same charge was made by the defendants in the answer to the original bill.

In support of this charge, Anderson, one of the arbitrators, was examined, who stated, that before they finally retired to deliberate, Van Wyck "offered some evidence, which Lydig refused to hear, telling him that he did not think the appraisers were bound to receive any." The next witness, in support of the charge, is Van Wyck, the person who offered the testimony, and he says, he offered "to bring witnesses to prove that the raceway would not cost, at the present rate of wages, more than 1,000 dollars. That Lydig replied, 'that he could not wait to receive such evidence.' That Van Wyck then offered to go into the evidence immediately, and no answer was given by either of the arbitrators, which he considered as a refusal."

An objection has been raised to the competency of the deposition of Van Wyck, on the ground that his examination was not closed by the examiner until after publication had passed. The examiner certifies, that it commenced on the 28th of June, and was continued to the 5th of July. How this irregularity arose does not appear; nor is it suggested that any actual abuse has arisen in consequence of it; and the witness was also cross examined, on the part of the Underhills, in the same way. I do not incline to suppress the deposition, and deprive the party entirely of the benefit of Van Wyck's testimo-

ny. It would seem to be too rigorous, when the other party has had the benefit of a cross examination, and has not raised the objection until the hearing, when no re-examination can be had, and when no ill use is stated to have been made of the irregularity. The question, whether the deposition shall be suppressed, is a matter of discretion; and in *Hammond's* case, (*Dickens*, 50.) and in *Debrex's* case, (1 *P. Wms.* 414.) the deposition of a witness examined after publication was admitted; in the one case, because the opposite party had cross examined; and in the other, because the testimony would otherwise have been lost forever.

The deposition of Anderson is also objected to.

The order allowing depositions taken in the original cause, to be read in evidence in the cross cause, excepted that of Anderson. He was, consequently, examined in the cross cause; but how was he examined? By copying his deposition in the original cause. He went, therefore, before the examiner with a prepared deposition. This is against the course and policy of the court. And it would lead to the most dangerous practices. The witness ought to go before the examiner, as Lord Coke observes, (4 *Inst.* 279.) "untaught and without instruction." He should be free to answer the sifting interrogatories that are framed for the issue *in that case*, instead of merely filing an affidavit ready drawn. I should undoubtedly be justified in totally suppressing the deposition of Anderson in the cross cause, if I was to follow the strict rule of authority. (*Amb.* 252. *Anon.* ' *Shaw* v. *Lindsey*, 15 *Vesey*, 380.) and

if I have allowed it to stand in consideration of the regularity of the original deposition, I hope it is an indulgence that will never be abused.

In opposition to this evidence of Anderson and Van Wyck, we have the answers of Abraham I. Underhill, Mott, and Lydig, who give a full explanation of the fact. They all separately state to this effect, "That after the appraisers had heard the allegations and proofs of the parties, and had conferred together, Van Wyck came into the room and offered to produce witnesses to prove the actual cost of the dam and raceway, and that the witnesses were not present; and that Lydig told him, with the acquiescence of the other two appraisers, that such testimony was not material or relevant, as the inquiry was not, what the works had cost, but what they were then worth. And they all deny that Van Wyck offered any other testimony, or to any other point."

Mott and Lydig, in their depositions taken in the original cause, equally disprove the allegation of a refusal to hear testimony. Lydig says, the appraisers did not refuse to receive further testimony offered, or ready to be offered, by either party, as long as it appeared to have any bearing on the appraisement; and that no witnesses were offered to prove the cost, or value, of the premises; and if either party had requested further time for that purpose, the appraisers would have allowed it. And Mott also testifies, that the parties were asked if they had any thing more to offer or produce, and they said nothing further; and that Van Wyck asserted in the room,

that the mill-dam had not cost as much as the plaintiffs had intimated, and that could be shown as a fact, and he urged the appraisers to take it into consideration; to which they answered, that it was their business to value the property according to its present value, and not its original cost.

It has been said, that there is some variance between the depositions of Mott and Lydig in the original cause, and their answers in the cross cause, but I do not perceive it. Their depositions are, indeed, more general than their answers, and this probably arises from the particular and sifting nature of the charges and interrogatories in the cross bill. The only expression that even looks contradictory, is one of Lydig's, in his deposition, that no witnesses were offered to prove "the cost or value" of the premises. But I think we are bound, in all candour, to conclude, that the word *cost* was here used as synonymous with the word value, with which it is coupled; because, in his answer, he explains fully the offer as to the original cost.

It appears to me, then, to be a just and necessary conclusion, from this proof, that the only testimony offered by Van Wyck, was that relating to the original cost of the dam and raceway. The weight of evidence is decidedly against any other conclusion. Van Wyck stands alone against the answer of Underhill, and the answers and depositions of Mott and Lydig. I say he stands *alone*, for the deposition of Anderson is general, and does not state what was the nature of the evidence offered, or to what point; and it may as well relate to the original costs of the

works as to any other object. This testimony may be rendered consistent with that of the other appraisers.

And it cannot, surely, become a question, whether evidence of the cost of a dam and raceway, built 21 years before, was material in an inquiry as to their then existing value. There could be very little, if any, analogy between the original cost and the present value, considering the space of time which had intervened, and the great variations in prices and labour, and business, and many other circumstances connected with such works. I doubt whether any court of justice would have deemed such evidence, in such a case, pertinent. Instead of being useful in guiding the judgment, it would, probably, have been delusive or injurious. There was no misconduct, or even the want of due discretion, in the arbitrators, in expressing a disinclination to wait until such immaterial, if not improper, testimony might have been hunted up and produced.

2. Another charge is, that the appraisers had a private and *ex parte* communication with Abraham I. Underhill, while they had the subject under deliberation. This charge is made in the answer to the original bill, and also in the cross bill, and the proof of it rests upon the single uncorroborated deposition of Anderson. He says, it was proposed by him, the witness, to call in Underhill, to ask him, what money was laid out on the mill, dam, and raceway, and that he was in alone when the question was put to him, and that he stated, that the plaintiffs had laid out 20,000 dollars.

In answer to this charge, Underhill states, that he was called into the room where the appraisers were deliberating, and that Philip Van Cortlandt and Van Wyck went in with him; and that some question was asked him by Anderson relative to the cost of the dam and raceway, and he answered, he did not know, as no separate account thereof was kept, and only an account of the costs of the whole works; and he denies that he had, at that, or any other time, any separate or private communication with either of the appraisers, on the subject of the appraisement, while the same was under deliberation.

The answers of Mott and Lydig state, that Underhill was sent for to obtain some information relative to the mill of Philip Van Cortlandt, which was also submitted to their appraisement; (though unconnected with this controversy;) and that Van Cortlandt was sent for at the same time, and was present with Van Wyck; and they have no recollection, and one of them says, no belief, of any question being asked relative to the cost of the dam, raceway, &c.; and they deny that any of the appraisers held any *ex parte* or private conversation, or communication, with him in the absence of the other parties.

The weight of evidence is clearly against the charge. The question which Anderson put to Underhill, was not put by the direction or sanction of the board; and it was when the other party was present, and no answer was given communicating any thing material. It would be very unjust, and

altogether unprecedented, to allow such a circumstance to affect the validity of the whole proceeding; and it may be proper to observe, in this place, that the credit of Anderson, as a witness, is extremely impaired by his own confession and conduct. He is called as a witness to impeach his own award, and his own integrity; and this case falls within the reason and policy of the rule of law, (4 *Johns. Rep.* 487. 4 *B. & P.* 326. 4 *Binney*, 150. 1 *Hen. & Munf.* 385.) that the affidavit of a juror is not to be received to impeach his verdict, because it would expose jurors to dangerous practices, and to be tampered with by the losing party. In this case, Anderson is alleging his own turpitude. He says, that Mott and he never did confer together, and disagree, before they appointed Lydig; and he avows that he acted with bad faith and duplicity, when he signed a report that they had compared opinions, and had found it necessary to choose a third person; and when he told the parties that they two had disagreed in opinion, and when he signed the award, declaring it to be "according to his best judgment and belief," can a man be entitled to credit, when he comes now and declares, that he acted the hypocrite in all those transactions? It is one of the maxims of the common law, (4 *Co. Inst.* 279.) that *allegans suam turpitudinem non est audiendus.*

3. Another charge of misconduct in the arbitrators is, that they did not examine the premises with sufficient accuracy, to enable them to form a correct and just estimate of the value. Anderson says this himself, though it does not appear that he made any

objection at the time, or required for himself, or solicited from his associates, a more particular examination. Van Wyck, the agent of Van Cortlandt, is of the same opinion, though he was present at the view, by the two appraisers, in May, and by all three of them in July, and was active in showing and pointing out the state of the works. Some of the bystanders, as the two Fowlers, were of the same opinion, and one of them was surprized that the arbitrators did not make inquiries of him. But the other two arbitrators, Mott and Lydig, declare, that they did make a careful, particular, and satisfactory examination. Mott says, that he and Anderson examined the works in May for two days, and about two hours each day, and that it was a careful examination; and that the works were examined by all of them in July, with particular attention; and that the works were viewed at both times in a careful and satisfactory manner; and he details a number of particulars. Lydig declares the same thing. It was for the arbitrators to judge when their examination was sufficiently minute and particular to satisfy their minds. It was a matter resting in their sound discretion. It would be impossible for any court to prescribe a precise rule on this subject. It must rest entirely in the judgment and integrity of the men selected by the parties. And what puts this point beyond all doubt or difficulty, is the fact, that the parties, by themselves, or their agent, were present and conducted the view. They should have directed the appraisers to more particulars, if they wished it, or thought it necessary. They might

have deemed the examination sufficient, or they would have pointed to objects for more minute inspection, and have called upon the appraisers for a more accurate survey. The appraisers were not only satisfied themselves, but they had every reason to conclude that the parties were satisfied also. If the parties were not, they should have spoken at the time, when the remedy could have been provided. It is inadmissible to set up the pretext now. And it appears to me that no award was ever assailed by a more unreasonable and groundless objection.

4. Another class of objections goes to the legal and technical form of the proceedings.

It is said, that Anderson and Mott were not duly appointed in the first instance, because each of them was not selected and appointed by both parties, but each party separately selected a man.

The words of the lease were, that the mills, &c. were to be appraised or valued, " by two persons indifferently chosen by the parties, and in case of their disagreement, by a third person, to be chosen by the two."

The usual construction of such covenants, is the one adopted by the parties, of each nominating a person. The Van Cortlandts were the first to put that construction upon the lease, by commencing with the nomination of Anderson, and informing the Underhills of it, and they then, on their part, nominated Mott: and no objection being made by either party, to the person nominated by the other, the two appraisers were received and acknowledged by both parties as truly appointed. Under this acqui-

escence and ratification, the appraisers became "chosen by the parties," within the meaning of the covenant; and it is impossible that either of them can now be permitted to say, that the two appraisers were not properly chosen; a nomination by each, with the assent of each others nomination, is as reasonable and fair a construction as could have been adopted.

It is again said, that the two appraisers had not "disagreed," so as to have been authorized to choose a third person. But it is admitted, that after devoting part of two days to the inspection of the premises, and conversing together on the subject, the two appraisers told the parties they had disagreed, and could not agree; and they also signed a writing, in which they stated, that they had examined the premises for parts of two days, and compared opinions as to their present real value, and found it necessary to choose a third person. What further evidence of disagreement could have been required, or given, than the solemn declaration of the appraisers themselves? It is true, Anderson now declares this was all imposition and falsehood practised upon the parties; but can he be heard in such an allegation, or is it worthy of any credit? After a party has discharged his trust, can he, at any time, vacate all his acts by declaring they were not done in sincerity? If this was to be tolerated, there would be no certainty or safety, either in the administration of justice, or in the ordinary business of mankind. But Mott, the other arbitrator, contradicts this assertion of Anderson, and says, that after viewing the works,

he and Anderson did confer together touching the value, and did mention widely different sums; and that there did not appear to be any rational prospect of their agreeing, and so he was led to believe, and in fact, that they did not, and were not, able to agree. This testimony puts an end to all further question on this point.

It is further said, that Lydig was chosen to assist the other two, and was not chosen as an umpire to decide independently by himself, as he ought to have been, according to the intention of the covenant.

The answer to this objection is, that Lydig was chosen with the consent and wish of all parties, to act with, and assist the other two appraisers, rather than to act alone. All agreed in that construction of the covenant, and the appraisement was accordingly so conducted. This is a conceded fact, and the parties must be deemed to have concluded themselves, by their own free consent and agency, from setting up any other construction for the purpose of defeating the award. It would be equally unreasonable and unjust. But if Lydig ought to have been chosen, and to have acted strictly as an umpire, still the act is valid, for the association of the other two appraisers with him, in viewing the premises in consultation, and in the award, does not vitiate the award by him as umpire. It is settled, in the case of *Soulsby* v. *Hodgson*, (3 *Burr.* 1474. 1 *Bl. Rep.* 463.) that if the arbitrators join in the umpirage, it does not vitiate it. The umpire may take what advice, or assessors, he pleases. It is still the umpirage

of the umpire only. The same observation was made by Lord Alvanley, as master of the rolls, that "an arbitrator might make use of the judgment of another upon whom he could depend, and the valuation of that person is his, if he chooses to adopt it."

5. There is a charge in the cross bill, though there is none in the answer to the original bill, of fraudulent practices by the Underhills, in procuring the award. The charge is, that they covered the cog-pit and part of the raceway with boards, and part of the garret floor of the mill with meal, to conceal defects from the observation of the appraisers.

The proof of this charge is to be found in the testimony of Walter and William Fowler—the first of them states, that between the first of May and July, 1813, the Underhills covered certain decayed parts of the mill with boards, and shingles where it leaked, and the floor on which the water had leaked, was strewn over with meal and bran by Abraham I. Underhill; but whether for the particular purpose of hiding the marks on the floor, or not, he does not know. The other witness states, that on the day of the expiration of the lease, Abraham I. Underhill drove some shingles into the roof, it having rained the day before, and the water leaked through upon the floor; and in order to hide the marks, he strewed meal, or flour, on it, and then had the floor swept, and he had planks laid over the plate of the flue which was decayed, and which had never been covered before, by which means the decayed parts were concealed, and this was done only one or two days before the expiration of the lease; and that,

between the 2d of May and 8th of July, boards were nailed up against the cog-pit, though there was an inside door to admit persons into it, and which was not fastened.

An objection was made to the competency of this proof. The depositions, though admitted to be read in the cross cause, were taken only in the original cause, which contained no such charge of fraudulent concealments, and therefore the proofs were *dehors* the pleadings, and not relative to any matter then in issue; and that, though the depositions in the original cause were, by a general order, allowed to be read in the cross cause, yet the order never could have intended to render valid such parts of the depositions as contained matter not properly admitted when the depositions were taken.

It is likewise objected to the cross bill, that it ought not to contain new matter not set up as a defence in the original cause, unless it be new matter subsequently arising, for it is intended only as aiding the defence to the original suit, and cannot be more extensive than the original defence. This is, undoubtedly, the general principle; but I am not clear that the cross bill may not set up additional facts as constituting part of the same defence, relative to the same subject matter. The first objection strikes me as more weighty; and I am of opinion that, upon sound rule, the matter improperly admitted in the depositions in the original cause, continue equally improper when the depositions are used in the cross cause, and that if the plaintiffs in the cross cause wished to avail themselves of that matter, they ought to have

had the witness re-examined. Proof taken in a cause should always be pertinent to the issue in that cause, *secundum allegata*, for the opposite party is not to be supposed to have filed his cross interrogatories with any other view, and he is deprived of the benefit of an examination on his part to such new matter.

I am of opinion, therefore, that all such parts of the testimony, taken in the original cause, as related to the misconduct of the party, ought to be suppressed, and this would leave the charge of the cross bill totally without proof. There was no witness examined in the cross cause except Anderson, and he proves nothing on this point.

But if we take this new matter into consideration, *ex gratia*, and in order to view the case in every possible light, how does the proof stand?

Abraham I. Underhill, in his answer, denies that he ever did use any means whatever, directly or indirectly, to conceal from the appraisers the real and true state of repair of the works. That it became necessary to close the business, and clear the mill of flour and other property, so that the premises might be in a proper state and condition for delivery to the lessors, at the expiration of the time, and as soon as they should be valued, &c. That the works, accordingly, ceased to be used, and the milling business was brought to a close, about the last of April, and he directed the side of the cog-pit to be boarded up, through which persons might otherwise have entered, and the mill was otherwise fully secured to prevent the machinery from receiving injury from

evil minded persons, and to preserve the same, and for no other purpose. He says further, that a short time before the expiration of the lease, and while engaged in repairing the mill, he caused the bridge and platform across the raceway to be repaired, and some boards were laid down and used in repairing the same, and a passage way to the gates of the raceway. He denies, that any boards or plank were laid down, except as aforesaid, or that the appraisers were thereby prevented from inspecting that part. He further admits, that part of the roof leaked in several places; and that he directed small quantities of bran, or shorts, to be placed in certain spots or places on the floor, under the roof where the leak was, and which had been the constant practice from the time the leaks were discovered, to absorb the water, and he thinks it probable there might have been some small quantities of bran, or shorts, on the floor, when the appraisers were there; and he denies that any thing of this kind was done to conceal the real situation of the roof.

This is a plain and palpable solution of the motives which led to the repairs, from which such a harsh conclusion has been drawn. It is to be observed, that neither of the witnesses charge any fraudulent design in the repairs. And, certainly, the inference of fraud is not a necessary one, and it might as well be applied to any repairs whatever, made near the termination of the lease. The works were still open to public inspection, and the opposite party might have seen, and known of all such repairs, at the time of the examination. They were

before their eyes, and there was no complaint made at the time by the inspectors, or the opposite party, or their agent, of any impediment therein, in the way of a fair and full inspection. On the contrary, Mott says, that the inspectors satisfactorily examined the machinery in the mill. That the side of the cog-pit was boarded up, and which he understood, at the time, was done to prevent the machinery from being injured after the Underhills had ceased to use it. That he and Lydig went into the cog-pit below, and under the machinery, and viewed the machinery; that there was a bridge, or platform, across the raceway, and some boards laid down, but nothing to prevent the raceway from being fully examined, and the inspectors, or some of them, did inspect the raceway, as well as that part where the bridge and boards were laid, as in the other part. Lydig gives, essentially, the same statement. And it would be extremely unjust to draw the conclusion of a fraudulent concealment, from circumstances susceptible of so easy and reasonable an explanation, and which were at the time within the view and knowledge of the appraisers and the opposite party, and which were not at all injurious, for they did not, in the judgment of the arbitrators, prevent a full and satisfactory inspection.

The only grave part of the charge, according to the testimony of the two Fowlers, is the sprinkling of meal on the garret floor, to hide from the inspectors the knowledge that that part of the roof had leaked. This really appears to me to be too trivial, and too improbable a story to deserve notice. It

cannot be supposed that men who had been for many years in great and enterprising business, and whose characters have not, in any degree, been assailed, should have resorted, and that too in the very presence of their own miller and his son, to so mean and paltry a fraud, merely to conceal so insignificant a defect as a leak in the roof, and that too for the purpose of enhancing the value of their buildings. But the proof here abundantly repels any inference of fraud. Mott and Lydig both declare, that when they were in the garret of the mill, they were informed (and one of them says it was by the Underhills) that the roof leaked in some places, and their attention was accordingly drawn to the circumstance, and they saw stains on the floor, but nothing to prevent it from being sufficiently and satisfactorily examined. Anderson says, he also understood at the time that the roof was leaky, and he did not observe that meal was strewed on the floor.

6. I come now to the real foundation of this controversy, and that is the sum at which the mill and its appurtenances have been valued. The other points on which I have hitherto dwelt, have been seized upon by the dissatisfied party, rather, I presume, as auxiliary to the great object of opening the award, on account of the alleged extravagance of the valuation. The question of valuation of property is, indeed, one on which it is almost impossible to give satisfaction. Men's judgments will differ exceedingly on this fluctuating subject. Lord Alvanley has observed, " that valuers differ so much, that

it is not very wise to agree to sell according to the valuation of any one."

My impression from the proof is, that the property here was considerably over valued; and I have been induced to study the case with more than ordinary attention, to see if there was any well established fact that would, upon sound principle, justify me in interfering with the award. But if I have been unable to discover any such sufficient ground, it is, then, my indispensable duty to adhere to the settled doctrines of the court, rather than make them bend to a case of individual hardship. I am no more at liberty than any other court, to follow my own wishes, in opposition to general principles; nor ought I to give undue importance to small circumstances, or exaggerate trifles, merely to aid a particular case, when, in any other case, it would not be permitted; this case, like all others, must stand or fall upon the application of the general doctrines of the court.

It has been made an objection to the damages awarded, that the arbitrators included in the estimate of the value of the mills, the value of the right which the lessees had acquired of using Evan's patent machinery for the manufacturing of flour. I cannot perceive any objection to that right being a subject of estimate. The arbitrators were to appraise, not only the mill, but "whatever might appertain thereto." And the machinery erected in the mill, under that patent, was protected by it, and the right of using it was an appurtenant, without which the machinery might have been useless. That

right must, of necessity, pass with the property in the mill, and whoever succeeded to the right of the mill, took the machinery with it, and the right attached to that machinery. The right was so far, of course, assignable. It belonged to that *machinery at that place*, whoever might be the occupier. The right must have that construction, and there is nothing appearing in the case to show, or even to raise a presumption, that the license was useless, or of no legal validity. The machinery was, therefore, properly estimated, as it then existed, that is, as patent machinery.

It is also objected, that the timber cut down and used by the lessees, in the buildings, was not assessed and deducted from the value of the mills and other works; but it is a sufficient answer to this, that the covenant for the arbitration did not extend to any other subject than the mills and their appurtenances. The timber was to be deducted from the amount of the appraisement, and not to form a part of it. The deduction was to be made by the parties after the amount of the valuation had been ascertained. Indeed, the Underhills assert, that it was proposed by them that the appraisers should, at the same time, include the timber used by them, and that the proposition was rejected by the other party. Whether this were so or not, it was at least the duty of the Van Cortlandts to have tendered proof on that point to the appraisers, if they wished that the timber should have been assessed at the same time; the subject was totally waived by themselves.

Another objection has been raised against the mode of the assessment, inasmuch as the appraisers did not, in their deliberations, assess each particular article in the mill, and its appurtenances, separately. But this was a matter resting in the discretion of the arbitrators. There was no rule of that kind prescribed for them, and their judgments were left free to adopt such mode or manner of valuation as would, in their opinion, lead to a satisfactory result. In fact, the two appraisers, Mott and Lydig, both declare, in their answers to the charge of this kind, that they did separately value the items of the property under appraisement which were of any magnitude and importance, and sufficiently so, to form a correct and just estimate of the whole. In the case of *Dick* v. *Milligan*, (2 *Vesey*, jun. 23. 4 *Bro.* 117.) the same objection was taken. The arbitrators awarded a general balance, but did not set forth particular *items*, allowed and disallowed, and the court say it was not necessary that the arbitrators should set forth a schedule of particulars, and state all the items of an account. If done, it would come to nothing, with regard to any thing the court could do. If they considered them sufficiently to determine the result, all was done that was necessary. The matter rested with them, and their judgment was conclusive.

Much testimony has been taken, to prove that the mill was greatly over valued. I shall not enter into the discussion of that part of the proof. Every other point has been considered with all possible indulgence; and even so much so, that a good deal of testimony has been read and considered, which, upon

strict rules, and even upon principles of policy and justice, ought to have been suppressed. But here, I think, the settled decisions of the court interpose an insuperable obstacle to the investigation of the question respecting the measure of valuation. Admitting, that there was no corruption or partiality in the arbitrators, (and none is pretended,) and admitting that there was no misconduct in them during the course of the trial, nor of fraud in the opposite party, (and none is established by proof,) then I say, that the court cannot inquire into the charge of an over, or under, valuation, or of the reasonableness or unreasonableness of the award, but the same is binding and conclusive. If every award must be made conformable to what would have been the judgment of this court in the case, it would render arbitrations useless and vexatious, and a source of great litigation, for it very rarely happens that both parties are satisfied. The decision, by arbitration, is the decision of a tribunal of the parties' own choice and erection. It is a popular, cheap, conversant, and domestic mode of trial, which the country have always regarded with liberal indulgence, and have never exacted from those unlettered tribunals, this *rusticum forum*, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted; and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators.

To show I am not mistaken on this point, it will be useful to review the cases.

In *Greenhill* v. *Church*, (3 *Rep. in Ch.* 49.) a bill was filed to be relieved against an award. The court declared, that they would neither confirm nor overthrow such awards, unless circumvention or corruption were proved. This was as early as 1635. And in *Cavendish's* case, which was before Lord Nottingham, (1 *Cas. in Ch.* 279.) he declared, that if parties, without the court, refer their differences, they choose their own judges, and this court would not relieve against an award, unless for corruption, going beyond authority, or the like.

The next case that I shall notice, was that of *Brown* v. *Brown*, in 1683, (1 *Vern.* 157. 2 *Ch. Cas.* 140.) which underwent a full discussion. A tenant for life suffered some mills and houses, of the value of 70*l. per annum*, to go to decay, and it was computed the reparations would cost 380*l.*; the remainder-man brought an action of waste, and the parties agreeing to an arbitration, it was by covenant made a rule of court; but pending the arbitration, the tenant repaired the waste, and forbid the arbitrators and umpire to proceed. The umpire, notwithstanding, awarded, that the tenant should pay 380*l.* The bill was brought to be relieved against this award, for the excessiveness of the damages, and for misbehaviour of the umpire. The damages were charged to be outrageous, as the repairs made good the decay within 40*s.* before the award, and the umpire had viewed them. Sergeant Maynard opposed the bill, on the ground, that fraud or collusion was necessary to avoid an award in equity; and that if awards could be set aside on slight pretences, they

might as well strike that title out of the books. The Lord Keeper North was of that opinion, and dismissed the bill, though he admitted that the 380*l.* was near the value, in that case, of the estate for life. He said, that chancery, in some cases, relieves against manifest error in the body of the award, but where the error does not appear without unravelling it, he thought it was not relievable. In the case of *Earl* v. *Stocker*, a very few years after, (2 *Vern.* 151. Hil. 1691.) the court set aside an award, on one of the excepted grounds, of interest and corruption in the arbitrators; and cases within the reach of the exception were referred to, as that of *Pitt* v. *Dawbra*, where the arbitrators had promised to hear witnesses, and had made their award without having heard them; and the *Butcher of Croydon's* case was also referred to, in which the arbitrator was not indifferent between the parties. In all these cases the award was set aside, on the ground of misconduct, partiality, or corruption, and not on the ground of error or mistake; and in *Croydon's* case, the Lord Keeper declared, that he did proceed barely because the damages were excessive, though the award, as it is stated in 1 *Vern.* 157. was for 300*l.* which was an enormous sum for that day, and was merely to repair, as the award expressed it, the honour of a man who was called a bankrupt knave.

It would be difficult to find cases stronger than those early ones, in favour of the binding nature of awards, when honestly and fairly procured. In *Waller* v. *King*, (9 *Mod.* 63.) the bill was to set aside an award for a palpable excess of damages;

for the plaintiffs had goods of the defendant to 7*l.* 10*s.* only, and yet he was awarded to pay 36*l.* Lord Macclesfield, who was then chancellor, said he would not set aside the award upon account of any hardship therein, because the arbitrators were judges of the parties' own choosing. A variety of cases to the same effect were decided during the time of Lord Hardwicke. He declared, repeatedly, that a bill to set aside an award must be founded upon the fraud, corruption, or misbehaviour of the arbitrators; that they were judges of the parties' own choosing, and, therefore, they could not object against the award as an unreasonable judgment; and that, whether it was rightfully or wrongfully determined, the parties were bound by it; and there could be no end to controversies if it were otherwise. This was his language in the cases of *Ives* v. *Metcalf*, (1 *Atk.* 63.) *Longwood* v. *Eade*, (2 *Atk.* 504.) *Ridout* v. *Pain*, (3 *Atk.* 494. 1 *Vesey*, 11.) *Tittensen* v. *Peat*, (3 *Atk.* 529.) and in other cases to which I might refer. The exceptions, or qualifications, to this rule, are mentioned also in those decisions of Lord Hardwicke; as for instance, where the arbitrators made the award clandestinely, without hearing each party, or where one of the parties had himself made use of fraud to mislead the arbitrators. Indeed, the cases uniformly, and necessarily, allow of relief, where this misconduct in the arbitrators, or this fraud in the party, be made to appear. (*Spettigue* v. *Carpenter*, 3 *P. Wms.* 361. *South Sea Company* v. *Bumstead*, 3 *Viner*, 139. pl.

39. 2 *Eq. Cas. Abr.* 80. pl. 8. *Burton* v. *Knight*, 2 *Vern.* 514.)

Lord Hardwicke was also disposed to extend relief to cases of palpable mistake, as in the instance of a miscalculation taken in an account, or of a mistake in a plain point of law; and he relied on a decision of Lord Cowper, to which he referred, (*Ridout* v. *Pain*, *sup anon.* 3 *Atk.* 614. *Corneforth* v. *Gier*, 2 *Vern*, 705.) The mistake intended by these cases, is a mistake as to figures, or of one thing, or fact, for another, and does not mean or apply to error of judgment, in its fair exercise upon a subject. Thus, in the subsequent case of *Knox* v. *Simmonds*, (1 *Vesey*, jun 369.) Lord Thurlow observed, that a party to an award cannot come to have it set aside, upon the simple ground of erroneous judgment in the arbitrator. For, to this judgment they refer their disputes, and that would be a ground for setting aside every award; there must be something more, as corruption or gross mistake, either apparent upon the face of the award, or to be made out by evidence. *and in case of mistake, it must be made out to the satisfaction of the arbitrator.* This was done in the case of *Champion* v. *Warham*, (*Amb.* 215.) where the arbitrators confessed a mistake in two sums, which turned the balance of the account, and the award was so far corrected.

The general doctrine on this subject is laid down in the most clear and explicit terms, by those of the judges of the courts of law, while they held the great seal as commissioners. I allude to Lord Ch. J. Eyre, and to the judges Ashurst and Wilson, in the

case of *Morgan* v. *Mather*, (2 *Vesey*, jun. 15.) In this case, they observed, that it would be a melancholy thing to set aside an award on matter of fact, because we differed from the arbitrators in judgment. It is their province to decide facts. The court does not take upon itself to inquire, whether arbitrators have judged right or wrong upon facts. The only grounds to set aside an award, are, 1. That the arbitrators have awarded what was out of their power, as if they award contrary to law; 2. Corruption, or that they have proceeded contrary to the principles of natural justice, though there be no corruption, as if without reason they will not hear a witness; 3. That they have proceeded upon a mere mistake, which they themselves admit.

This case was afterwards brought up for rehearing before Lord Loughborough, and he observed, that "all the arguments of the counsel was upon error and mistake, and they had not stated corruption, misbehaviour, or excess of power, which were the only three grounds for setting aside awards. If parties agree to refer matters to judges of their own choice, this court cannot correct the error of their judgment upon facts.

The observation of Lord Alvanley, some years afterwards, in the case of *Emery* v. *Wase*, (5 *Vesey*, 846.) was equally strong and emphatical. He said, that arbitrators chosen by the parties, ever had, and he hoped ever would have, both at law and in equity, an authority, so that the award should not be overhauled, unless upon fraud, imposition, or gross mistake. Indeed, the law is understood to be so

well settled on this subject, that during the time of Lord Elden, the question as to the power of relief against the mistaken judgment of arbitrators, seems to have been entirely at rest, and the cases which have occurred before him, have only related to the means of excluding all partiality, unfair proceedings, and undue influence, from affecting the decision of the arbitrator. (*Walker* v. *Ferbisher*, 6 *Vesey*, 70. 9 *Vesey*, 68. *S. C.* *Tetherstone* v. *Cooper*, 9 *Vesey*, 67.)

In finishing this review of the most material chancery decisions, on awards, I think we may safely conclude, that the law is as well settled on this as on any other subject whatever. The conclusiveness of the judgment of arbitrators, has received the uniform sanction of the court for a series of ages. The rule is not now to be shaken or disturbed, and is founded in so much reason and public convenience, as not to be confined merely to the court of chancery, but to have met with the general approbation of mankind.

The courts of law have always been averse to granting any relief in these cases, and the injured party was obliged to resort to equity. In an action at law, on an award, even the corruption or misconduct of the arbitrators is no defence. (2 *Wilson*, 118. 3 *Johns. Rep.* 367. 8 *East*, 344.) And where submission to arbitration had been made a rule of court of K. B. and the arbitrators were charged with mismanagement in refusing to hear one party, Lord Holt made it a question, whether the integrity of the arbitrators could be arraigned. (*Morris* v. *Reynolds*,

2 Ld. *Raym.* 857.) In this he was properly overruled; but it appears to be settled, that a court of law will not, even where the submission is made a rule of court, enter into the merits of an award, but will look only to legal objections on the face of it, or such as go to the misbehaviour of the arbitrators. (*Lucas* v. *Wilson*, 2 *Burr.* 701. *Chace* v. *Westmore*, 13 *East*, 357.) The statute of 9 and 10 W. III. c. 15. and which was adopted by this state in 1791, allowing submission to arbitrators to be made a rule of court, and to be enforced by attachment, provided for relief, in the special case in which the award shall have been procured by corruption or undue means. The statute contains the legislative sense of the final nature of awards, except the specified case. But though the relief be as much limited at law as under the statute, as it has been in this court, yet it was not, as has been suggested, from any disposition to discourage this cheap and speedy mode of settling disputes. In *Hawkins* v. *Colclough*, (1 *Burr.* 274.) Lord Mansfield declared, that awards were considered with greater latitude and less strictness than formerly, and it was right they should be liberally construed, because they were made by judges of the parties' own choosing.

The English law on the subject of awards has, I apprehend, been adopted very universally in this country. In *Parker* v. *Avery*, (*Kirby*, 353.) decided in Connecticut soon after the revolution, it was declared by the court, to be unprecedented there, to go into the merits of an award; and that the reasonableness or unreasonableness of it did not affect

its validity, so that there be no misbehaviour or corruption in the arbitrators. The same rule prevails in South Carolina, as appears from the case of *Mulden* v. *Craval*, (2 *Bay*, 370.) The judges all agreed that too easy an ear ought not to be lent to complainants, against awards made by judges of the parties' own choosing, and who possess all the power of courts of law and equity in the given case. They said, that the great principle laid down by Lord Hardwicke was the best general rule which could be adopted; and which was, that the only ground to impeach an award, was corruption or great misbehaviour in the arbitrators, and to which they thought might be added gross mistake, or palpable error, though the explanation on that point was not fully given. The same rule has been repeatedly laid down in the courts in Virginia. The reason for setting aside an award, according to the cases there, must appear on the very face of it, or there must be misbehaviour in the arbitrators, or some palpable mistake. (1 *Washington*, 14. 158. 2 *Hen & Munf.* 408.) Nor is this general doctrine peculiar to the English law, or to the courts in this country, which have followed its jurisprudence. The distinction between awards and forensic judgments, the short, precise rules of the one, and the liberal equity and compromised terms of the other, are strikingly contrasted in one of Cicero's orations. (*Pro. Q. Roscio Comodo*, 4.) But if we resort to the authoritative text of the civil law, we shall find the principle of the conclusiveness of awards as strongly laid down as it is in any of the English decisions. *Stari autem*

debet sententio arbitri quam de re dixerit, sive æqua, sive iniqua sit, et sibi imputet qui compromisit. (*Dig.* 4. 8. 27. 2.) The Prætor would not interfere with the decisions of these domestic tribunals, for the very reasons which have been adopted in modern times, because they put an end to suits, and were of the parties' own choice. *Tametsi neminem Prætor cogit arbitrium recipere, attamen ubi semel quis in se receperit arbitrium, ad curam et solicitudinem suam hanc rem pertinere Prætor putet: non tantum, quod studeret lites finire, verum quoniam non deberent decipi, qui eum, quasi bonum virum disceptatorem inter se elegerunt.* (*Dig.* 4. 8. 3. 1.) But the civil law afforded a remedy against the award, if it was procured by fraud and corruption, *posse eum uti doli mali exceptione.* (*Dig.* 4. 8. 3. 1.) The observation of one of the civilians under this title, lays down with precision, the rule and the exception, the conclusiveness of the award, with the exception of fraud in the arbitrator, or in the party. *Partes aut stare debent sententia sive æqua, sive iniqua sit, nisi Dolus Partium aut arbitrorum arguatur.* (*Hub.* lib. 4. tit. 8. sect. 7.) I will dwell no longer on this subject, than merely to refer to a case stated in the Institutes, which is very much in point. If it be agreed, that a thing be sold at a price to be fixed by a third person, *quanti ille æstimaverit*, the agreement is valid, and the price fixed by the arbitrator must be paid. (*Inst.* 3. 24. 1.) But Vinnius, in his commentary on this passage, qualifies the award with this exception. *Ergo etiamsi Tituis arbitrator multo plurisve aut minoris rem æstimaverit quam valet, dicendum est valere contractum. Sane si*

arbitrium Titii tam pravum est ut manifesta ejus iniquitas appareat consentiens fere omnium opinio est arbitrio boni viri iniquitatem corrigi posse. The case here stated is the very one we are considering. The parties choose arbitrators to fix the price of the mill, and they must abide by the price declared, be it too high or too low, unless fraud can be shown. This award would be declared binding by Vinnius, sitting under the civil law; and it must be equally so declared under the law of this country.

Before I conclude, I ought to take notice of an objection that was raised to the jurisdiction of the court. It is said, that the Underhills ought to have pursued at law their remedy upon the award, as it was simply for the payment of money, and no account is sought or called for. To this it is answered, that the omission of the complainants, in the original suit, to sign the lease, was a mistake that rendered it necessary to seek their relief here; and that their right arises partly as assignees of a chose in action, on which they could not have had a suit at law in their own names. These reasons are, probably, of themselves sufficient, but at any rate, by answering in chief instead of demurring, the defendants submitted the cause to the cognizance of this court, and they come too late, at the hearing on the merits, to raise the objection. It would be an abuse of justice if the defendants were to be permitted to protract a litigation, to the extent, and with the expense that this has been; and then, at the final hearing, interpose with this preliminary objection; and such appeared to be the opinion of a majority of the

court of errors, in the case of *Ludlow* v. *Simond*, (2 *Caines in Error*, p. 40. 56.)

I shall, accordingly, decree, that the plaintiffs in the original suit recover the sum awarded, and that there be a reference to the master, to take an account of the value of the timber, as it was when standing, which was cut on the premises and appropriated towards building the mill, and its appurtenances, according to the provision in the lease; and, also, to take an account of the assets, real and personal, of the estate of Pierre Van Cortlandt, deceased, and which came to the hands of the defendants, as his representatives; and that all further questions be reserved until the coming in of the report.

Before I close, I must briefly observe upon a recent occurrence in this case. As the opinion was about to be delivered, on the 20th inst. the counsel for the defendants in the original suit, presented a petition, in which they offered, in lieu of the sum awarded, to release, in fee, to the plaintiffs, the premises, together with such quantity of adjacent land as the court should deem reasonable and requisite, to the full enjoyment of the mills, &c. This proposition was altogether distinct from the controversy before me, and was not contained in the pleadings or proofs, or suggested upon the argument; and I do not feel myself authorized to act upon it, any further than to suspend the decree until the counsel for the plaintiffs had communicated the proposition to their clients, and obtained their answer. That answer is now received, and the offer is declined, for reasons

which are therein mentioned, and with which I have nothing to do. Whatever my opinion, or wishes may be, I consider that terms of accommodation rest exclusively with the parties. If the proposition had been made in the first instance, at the publication of the award, and had been inserted in the pleadings, it would have been regularly before me as part of the case, but it comes too late, and at the very close of the controversy. I must decide the cause upon the pleadings and proofs.